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Historia Placitorum Coronæ.

THE
HISTORY
OF THE
Pleas of the Crown.

By SIR MATTHEW HALE,
LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

PUBLISHED FROM THE ORIGINAL MANUSCRIPTS

By *SOLLOMEMLYN*, of *Lincoln's-Inn*, Esq.

WITH

ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE PLEAS OF THE CROWN.

By GEORGE WILSON, SERJEANT AT LAW.

A NEW EDITION.

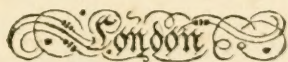
AND

AN ABRIDGMENT OF THE STATUTES RELATING TO FELONIES
CONTINUED TO THE PRESENT TIME, WITH NOTES
AND REFERENCES,

By THOMAS DOGHERTY, Esq.
OF CLIFFORD'S-INN.

In Two Volumes.

VOL. II.



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THE HISTORY

OF THE

EMPEROR OF THE ROMANS

BY SIR MATTHEW JARVIS

AND JOHN JARVIS

IN TWO VOLUMES

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A NEW EDITION

THE HISTORY OF THE ROMAN EMPIRE, FROM THE DEATH OF ALEXANDER THE GREAT TO THE FALL OF THE WESTERN EMPIRE, IN THE YEAR 476.

A THOMAS DOUGLASS

IN TWO VOLUMES

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1773

THE HISTORY OF THE ROMAN EMPIRE, FROM THE DEATH OF ALEXANDER THE GREAT TO THE FALL OF THE WESTERN EMPIRE, IN THE YEAR 476.

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HISTORIA PLACITORUM CORONÆ.

PART II.

CHAP. I.

Touching the king's bench.

HAVING gone through the several kinds of capital offenses, I should now, according to my first proposed method, proceed to the enumerating and considering of offenses that are not capital; but I shall reserve that for the third part of this tractate.

1. Because the subject thereof is very large, numerous and various, and would exhaust too much of that time I have or can spend from other employments.

2. Because the method, order and rules of proceeding in capital causes, is different from any other course of proceeding in other criminal causes, and hath an appropriate method of proceeding by law consigned to it, and therefore they are fittest to be handled together.

And in this business I shall proceed in things as they arise in the order of proceeding in capital causes: *First*, I shall take a very brief account of the courts and jurisdictions wherein [2] they are to be decided; and this I shall not do at large, but so far forth only as it relates to proceedings in capital causes: and when I have briefly passed over that, then, *secondly*, I shall proceed with the whole tract of proceeding in criminal causes, from the first pursuit of the offender to his execution; as, namely, arrest, process, out-

lawry, arraignment, pleading, challenge, trial, clergy, sanctuary, judgment, reprieve, execution, &c. in the very same order as a course of proceeding in capital causes lies.

I. I begin with the jurisdictions, wherein causes of this nature are handled.

And altho the court of parliament is the highest court in this kingdom, and a court wherein proceedings capital have been often heard and determined, yet I shall decline that business, 1. Because the course of proceeding in parliament is in a different method and order, than what is used in other ordinary courts. 2. Because the instances are many and various, and will take up a volume to give an account of them. 3. Because I have elsewhere gathered up some observations of that kind already.

The highest ordinary court of justice next to the court of parliament. is the court of king's bench; I shall not at large pursue the jurisdiction of this court, for it hath been done to my hands amply already (*a*).

But I shall only consider it with relation to capital proceedings, namely, treasons and felonies, and that very briefly; and therein, 1. Concerning the jurisdiction of the court in this particular. 2 Concerning the power of the judges of this court out of court, in relation to matters of crime or misdemeanor.

The court of king's bench consists of two kinds of jurisdictions, viz. the civil jurisdiction or the plea-side, and the criminal jurisdiction or the crown-side.

Till the time of Edward II. the matters of both kinds were entered promiscuously in the rolls; but then the rolls were discriminated, and those of the crown-side, entitled *Rex*, tho both were filed up together in the same bundles.

And thus it continued very long, but of later times the records of the pleas are bound up by themselves, and the records of the pleas of the crown bound up by themselves, and kept in the crown-office, under the immediate custody of the coroner of the king's bench, who is also the king's attorney in that court, and clerk of the crown.

In cases criminal, the court of king's bench have a different kind of proceeding touching offenses arising in the same county where they sit, and offenses in other counties, and removed before them by *Certiorari*.

(a) By lord Coke, 4 *Instit.* cap. 7.

In the county where the court sits, there is every term a grand inquest, who are to present all matters criminal arising within that county, and then the same court proceeds upon indictment so taken; or if in the vacation-time there be any indictment of felony before the justices of the peace, *oyer and terminer*, or gaol-delivery there sitting, it may be removed by *Certiorari* into the king's bench, and they may proceed *de die in diem*, and there need not be fifteen days between the *Teste* and return of the *Venire facias*, because the offence ariseth in the same county.

But if an indictment of felony be removed out of another county than where the king's bench sits, and the prisoner comes in either *gratis*, or by *Habeas Corpus*, or process, there must be fifteen days between the *Teste* and the return of the *Venire facias*. 9 Co. Rep. 118. *b.* lord Sanchar's case.

At common law, if a record of an indictment, or other thing come into the court before the filing thereof, the court may remand it; for 'till it be filed it is no record of the court; but if it be once filed, it is not to be remanded.

But if the issue be joined, the transcript may be sent down to be tried by *Nisi prius*; but the original record remains in the king's bench. 5 Martiæ, B. Coron. 231.

But by the statute of 6 H. 8. cap. 6. in cases of indictments of murder, or other felony removed into that court, the court may remand the indictments, and the bodies of the prisoners to the justices of the peace, gaol-delivery, and other justices, where the felony was committed, commanding them to proceed there- [4] upon, as if the prisoner or indictment had never been removed.

The court of king's bench is in the county where it sits, a court in *eyre* and more, 27 Affiz. 1. and also the sovereign court of gaol-delivery and *oyer and terminer*. 9 Co. Rep. 118. *a.* lord Sanchar's case.

And therefore when the court of king's bench comes into any county, there can be no session of the commission of gaol-delivery, or *oyer and terminer*, or peace during the term-time, while the court sits; it doth not determine the commission, but suspends their session during the term; for in the vacation-time, they may proceed again upon their former commission, and so it is not like a new commission, which after publication supercedes the former, *de quo infra*, lord Sanchar's case, *ubi supra*.

But if an indictment be found before commissioners of *oyer* and *terminer* in the vacation-time in the county where the king's bench sits, or in any other county in term or vacation, there may issue a special commission to determine that indictment, with a writ to the former commissioners to deliver it to the new commissioners; and these special commissioners may sit in the term-time in the county where the king's bench sits; but then the king's bench must adjourn during that session of this special commission: ruled in Sir *Walter Rawleigh's* case, *M. 1 Jac. Co. P. C. cap. 2. p. 27. Dyer 286. b. Plowd. Com. 390.* earl of *Leicester's* case, wherein is the whole order of such commission. *4 Co. Instit. p. 73.*

The court of king's bench is the sovereign court of *oyer* and *terminer*, therefore tho some acts limit proceedings in some criminal causes to the justices of *oyer* and *terminer*, yet the king's bench may proceed upon them; but justices of peace cannot, as upon *5 Eliz. cap. 14.* for forgery, *8 H. 6. cap. 12.* stealing records, &c.

If a person attainted in the country be removed by *Habeas Corpus*, and the record removed also by *Certiorari*, this court may award execution. *M. 5 Car. 1. B. R. Cox's* case (*b*).

[5] This court is also the sovereign coroner of *England*, and therefore may take appeals of death, &c. by bill. *4 Co. Instit. p. 73.*

Where judgment of death is given in the king's bench, the execution is to be made by the marshal of the court; for the prisoner is supposed to be *in custodia marescalli*; and the entry is always, *Et præceptum est marescallo, &c. quod faciat executionem periculo incumbente; quod vide Co. Entries in title Indictment, per totum*; but there may be a mandate to the sheriff of the county wherein execution is to be made, to be assisting; and thus it was done in *H. 24 Car. 2.* in the case of *Brown*, who had judgment of death in the king's bench for a felony committed in *Middlesex*, and executed by the marshal in *Surrey*, because the prison was there; but he might have done it in *Middlesex*, for he is a minister of the king's bench in each county; and so it might be, tho the felony had been done in any foreign county removed by *Certiorari* (*c*).

By the statute of *33 H. 8. cap. 12.* felonies, &c. within the king's palace are made triable before the lord steward, and a special order

(*b*) *Cro. Car. 176.*

(*c*) Thus it was done in *Althoe's* case

before mentiond, *Part I. p. 464.*

of trial directed by that statute, namely, by the king's servants in his chequer-roll; yet for a felony within the king's palace, if the king's bench be sitting in the same county, the proceeding may be in the king's bench; for the statute of 33 H. 8. being in the affirmative is not exclusive of the king's bench for felonies that were before that, 10 Co. Rep. 73. b. But indeed where a felony is *de novo* created, and with it a new special form of proceeding, as by the statute of 3 H. 7. cap. 14. for conspiring the death of the king. &c. it is not triable in the king's bench, nor in any other form than is limited by that act. M. 20 Jac. B. R. *Castle's case* (d).

Now concerning the justices of the king's bench.

They are in their persons conservators of the peace throughout England without any other commission; and any of them may issue out their warrants for apprehending of a malefactor, or for surety of the peace in any county of England, namely, to [6] apprehend and bring him before a justice of peace in the county where he is apprehended; and this warrant is directed under their hand and seal to sheriffs, constables, and other officers. Each judge of that court hath a tipstaff attending him, being a deputy to the marshal for the execution of his office in that special service; and the chief justice, or any one of the other judges of that court, may by the custom of that court, *ora tenus*, command the tipstaff to apprehend any person for matters of misdemeanors relating to the court, or other misdemeanors, and bring him before him, and such arrest is justifiable without any other warrant, and without shewing the cause. T. 11 Car. B. R. 2 Rot. Abr. p. 558. *Throgmorton and Allen*.

The chief justice of the king's bench is not *that Justiciarius Angliæ* which was antiently in use; for *that Justiciarius Angliæ* had, in effect, all the jurisdiction both civil and criminal, that is in the king's bench, chancery, common pleas, and exchequer, and might and did sit in any of those courts as the chief judge of them, as appears by many evident instances.

But the chief justice of the king's bench hath in the court of king's bench, as one of the judges thereof, that part of the jurisdiction of the *Justiciarius Angliæ*, which concerns criminal causes, and the inspection and reformation of the judgments of other courts.

It is true he is frequently called chief justice of England, because he presides in that court where the *Justiciarius Angliæ* did most fre-

(d) Cro. Jac. 463.

6 HISTORIA PLACITORUM CORONÆ.

quently and naturally fit as the king's deputy in administration of justice; but it is a misconception that therefore he is *that Magnus Justiciarius Angliæ*, which was in use before the time of Henry III.

He is created by writ, and always was; but the *Justiciarius Angliæ* by patent.

3 Blackf. Com. ch. 4. p. 41. 4 Blackf. Com. ch. 19. p. 265. 2 Hawk. P. C. ch. 3.

[7]

C H A P. II.

Concerning the courts before the lord high steward, and the steward of his majesty's household.

TOUCHING the *former* of these, it is instituted for the trial of peers of the realm: more cannot be said touching it, than is already said by my lord Coke, 4 *Inst. cap. 4. Co. P. C. cap. 2. p. 28. & sequentibus*, and because it doth not concern the usual and common proceedings against common persons, I shall dismiss it.

Touching the *second*, namely, the proceeding before the lord steward of the household, &c. for treasons, and murder, and manslaughter, and larceny done within the king's palace.

This court is established, and the method of proceeding therein punctually delivered by the statute of 33 *H. 8. cap. 12.* which will not need much explanation, only these things are considerable therein.

1. As to their power of hearing and determining treasons in that court, it seems to be wholly abrogated and repealed by the statute of 1 & 2 *P. & M. cap. 10.*

2. Whereas by that act, clergy is taken away in cases of manslaughter, felonious stealing of goods in the king's house of the value of twelve-pence; it seems to me clergy is restored in these cases by the act of 1 *E. 6. cap. 12.* tho the party be convicted according to the statute of 33 *H. 8.*

3. Whereas breaking of the king's house with intent to steal, is made felony by that statute without benefit of clergy, *that* breaking of the king's house is become no felony by the statute of 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.* tho he be arraigned before the steward of the *Marshalsea* according to that act.

4. The

4. The offense of felonious stealing of the king's goods of the value of twelve-pence, or breaking the king's house to steal the goods, is limited by that act to be tried before the steward of the *Marshalsea*, and others associated to him by the statute, but not before the lord steward, or treasurer, or comptroller of the household, as manslaughter or murder is directed to be tried or determined by that statute, nor by the king's servants.

5. It seems to me, that by the direction of that act the proceeding of the lord steward, or steward of the *Marshalsea*, is to be by a session within the king's house or palace where the felony is committed; and that statute limits the precinct of the king's palace for that purpose, *viz. within any edifices, places, courts, gardens, orchards, privy-walks, tilt-yards, wood yards, tennis-plays, cock-fights, bowling alleys, near adjoining to any of the houses aforesaid, and being part of the same, or within 200 foot of the standard of any outward gate, or gates of any of the houses above rehearsed, commonly used for any passage out of, or from any of the houses above rehearsed.*

And therefore if it is considerable, whether as to this purpose, *viz.* for trial of felonies within the king's palace, the extent of the king's palace of *Whitehall* limited, or rather extended by the act of 28 H. 8. cap. 12. be not restrained; for by that statute that new palace of *Whitehall*, the old palace of *Westminster*, *St. James's park*, and the street leading from *Charing-Cross* to the sanctuary-gate of *Westminster*, and all the houses and buildings on both sides of the street from the *Cross* to *Westminster-hall*, and between the water of *Thames* on the east and the park-wall on the west, and all the soil of the old palace are made parcel of the new palace.

Upon this doubt I did advise, that the lord steward upon a late occasion upon this act should not sit in *Westminster-hall*, but in *White-hall*, according to the restriction of the statute of 33 H. 8. which was after the statute of 28 H. 8. and seems as to this purpose to restrain it; but this advice was not followed, for he sat in *Westminster-hall*.

Atho this act erects a new kind of jurisdiction, and that without any commission, yet it being an act act in the affirmative, it doth not exclude the jurisdiction of the king's bench, nor of commissioners of *oyer* and *terminer* to hear and determine these offenses, tho committed in the king's palace, especially *that* commission

of *oyer* and *terminer*, which hath been usually granted to determine felonies and treasons within the verge, and particularly within the king's palaces; and therefore, tho this act of 33 *H. 8. cap. 12.* hath been long since made, and is a commission of itself to the lord steward, and in his absence to the treasurer and comptroller of the household, yet till this year I never knew nor heard of any session upon this statute: but the whole business of this nature was transacted in the king's bench, or by *that* antient and special commission of *oyer* and *terminer* for offenses within the verge, which commonly also had in it a commission of gaol-delivery, and was usually directed to the lord steward, lord chancellor, treasurer, justices, &c. whereof we may see the precedent, 4 *Co. Rep. Holcroft's case (a)*, the record whereof is at large, *New Entries, fol. 54. (b)* in an appeal, where it appears by the indictment, that the manslaughter was committed *infra hospitium domini regis de Hampton-Court*, yet the inquisition was found by the coroner, and the party tried before the commissioners of *oyer* and *terminer* and gaol-delivery for the verge, and not before the lord steward, by force of the act of 33 *H. 8.* and adjudged good.

And there it is also resolved 4 *Co. Rep. Wrot's case (c)* and *Swift's case (d)*, that as the commissioners of gaol-delivery and *oyer* and *terminer* for the verge, have power to hear and determine felonies done in the king's palace, so the king's bench or general commissioners of *oyer* and *terminer* or gaol-delivery, and justices of peace for the county, have power to hear and determine any felony committed within the verge, so that they have all a concurrent jurisdiction, namely, the

[10] lord steward, commissioners of *oyer* and *terminer* and gaol-delivery for the verge, commissioners of *oyer* and *terminer*, gaol-delivery and peace for the county at large, tho the offense were committed in the king's palace.

(a) 4 *Co. 45. b.* (b) This is *Co. Entries. 53. b.* (c) 4 *Co. 46. b.* (d) *Ibid.*

4 Blackf. Com. ch. 19, p. 261. 276. 2 Hawk. P. C. 5. 7.

C H A P. III.

Touching special commissions of oyer and terminer, and their kinds and power.

COMMISSIONS of *oyer* and *terminer* are of two kinds, special, or general for a whole county.

Special commissions are of several kinds. 1. Commissions of *oyer* and *terminer* for the verge. 2. For crimes done upon the sea by the statute of 28 H. 8. cap. 15. 3. Commissions for particular places, that are not counties. 4. Commissions to hear and determine particular facts. 5. Commissions to hear or enquire, and not determine. 6. Commissions to determine, and not enquire.

I. Touching commissions of *oyer* and *terminer* for the verge, *viz.* within twelve miles of the king's court somewhat hath been before said; I shall add farther,

1. That by virtue of that commission they have power to inquire and determine felonies and murders done within the king's house. 2. And these they are to proceed upon, not according to the direction given to the lord steward, *viz.* by the king's yeomen officers, tho there is a grand inquest of them also; but by the good men of the county, wherein the offense was committed, whether it be committed in the palace, or elsewhere within the verge. 3. Tho the commission extend into several counties; namely, any that are within twelve miles of the tenet of the king's hall, yet they are to hold their sessions in any county within the verge, and a precept issues [11] to the knight marshal to impanel a grand inquest out of every county within the verge, of the men of those counties to appear where they sit, and there to inquire and try the offenses committed in that county. 4. That they can only proceed upon indictments taken before themselves, and therefore cannot proceed upon a coroner's inquest; and to remedy that inconvenience, they have always, or at least should have in the same commission, a commission of gaol-delivery; and by virtue of that part of their commission they may proceed upon the coroner's inquest; *vide Co. Entries* 34. in *Holcroft's* case. 5. It seems to me, that if a special commission for the verge issue, which possibly may extend to *Middlesex*, *Surry*, and *Hertford*, if a general commission of *oyer* and *terminer* in the county of *Middlesex* issue
after

after *that*, with notice to the commissioners for the verge, it determines their commission of *oyer* and *terminer* as to *Middlesex*; but not as to the other counties; and so for a general commission of gaol-delivery; for this is not aided by the statute of 2 & 3 P. & M. cap. 18. for that preserves only the commissions granted to cities and boroughs. 6. And *à converso*, if a general commission of *oyer* and *terminer*, or gaol delivery for the county issue, and then afterwards a like commission issue for the verge, notice thereof, or session by the commission for the verge determines the general commission as to so much of the county, as is within the precinct of the verge; see the whole procedure, *Coke's Entries* p. 54, 55.

The commissions for the verge have often issued, I do not remember any session since about 8 Car. 1. for the businesses that fall within their cognizance, are as well and effectually dispatched in the king's bench, or by general commission of gaol-delivery, and *oyer* and *terminer* in the several counties at large; *quod vide* 10 Co. Rep. 73. b. the case of the *Marshalsea*, 4 Co. Rep. *Wroth* and *Wigg's* case, and *Holcroft's* case there cited; only indeed the coroner of the verge is a necessary officer; *de quo postea*.

But the original power of the steward and marshal touching felonies within the verge, tho I know nothing that hath expressly
 [12] taken it away, yet by *disuser* is in effect vanished, and that jurisdiction is wholly exercised by this special commission of *oyer* and *terminer*, or in the king's bench, or general justices of *oyer* and *terminer* or gaol-delivery at large, who have jurisdiction of such felonies, tho committed within the verge; *vide Coke super statut. Articuli super Cartas*, cap. 3 & 10 Co. Rep. *le casé de Marshalsea*.

II. The second kind of special commission of *oyer* and *terminer*, is, that which is founded upon the statute of 28 H. 8. cap. 15. for offenses upon the sea, or in great rivers below the bridges.

I shall not enter into a large description of the admiral's jurisdiction, but only set down briefly some observations in relation to capital offenses, because I have elsewhere more at large examined it.

As to criminal causes, that are capital, as treasons, felonies, &c. there is a threefold jurisdiction relative to the admiral and court of admiralty.

1. Its primitive and original jurisdiction, and this was of treasons, felonies, or piracies done upon the high sea, which was sometimes held before the admiral, or his lieutenant as such without relation to
 any

any other commission; and sometimes by special commission under the great seal, even whether there was an admiral in being or not.

The rule of their proceeding was *secundum Legem maritimarum*, their trial by proofs; and therefore, though they did proceed oftentimes to sentence of death, and executed it, yet in as much as the proceeding was according to the course of the civil and marine laws, and not according to the common law, it worked no corruption of blood.

Tho their jurisdiction was of things done upon the high sea, yet they might hold their session in any place upon land.

And altho at this day it is commonly received, that the courts of the common law have no jurisdiction of felonies committed upon the high sea, yet most certainly the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties, and it was presented and tried by men of the adjacent counties. *T. 18 E. 2. Rot. 18. Rex. Glouc.* [13] *& Somers'. M. 26 E. 3. Rot. 51. Norfolk. T. 34 E. 1. coram Rege. Rot. 34. Norfolk. T. 8 E. 2. ibidem Rot. 111. M. 18 E. 2. Rot. 15. M. 19 E. 2. Rot. 17. Rex. T. 25 E. 3. Rot. 22. Linc. M. 27 E. 3. Rot. 29. Rex. (a). 8 E. 2. Coron. 399. 40 Affix. 25.* So that the

court

(a) The cases refered to here by lord Hale, as proofs of the ancient jurisdiction of the king's bench in offences done upon the seas, were as follow:

T. 18 E. 2. Rot. 18 Rex. Several persons of *Bristol* had been indicted before the admiral of the king's flota, "per inquisitionem de mandato regis inde factam, per sacramentum marinariorum, quod vi & armis, & felonice deprædati fuerunt navem de *Placentia* in alto mari, inter *Le Ras sancti Martini, & Odjers'*, de bonis & mercimoniis, &c." The indictment was returned into chancery, and a writ issued to the sheriff of *Gloucestershire* to attach the said persons, and bring them *coram seipso* and the mayor of *Bristol* & *audita querela*, to do justice to the merchants, "sive per recuperationem bonorum secundum legem mercatorum, & noluminus inactores, prædictos in personâ salvo custodiri facere," till they should be delivered by course of law. The sheriff neglecting to execute effectually what was enjoined him by the said writ, a second writ was directed to the mayor of *Bristol*, "Quod præmissa omnia & singula diligenter & efficaciter faceret, &c." Afterwards *processus totius negotii prædicti* was brought *coram rege*, by which it appears, that one *Clement Turtle* had been implicated before

the said mayor, by the master of the ship, &c. "Quod habuit ad partem suam de bonis deprædati ad valentiam 25. in iustis, &c. Et hoc parati sunt verificare per mercatores & marinaros villæ prædictæ." *Turtle* pleaded not guilty, and was acquitted by a jury of merchants and mariners; the which jury *ex officio* again indicted the same persons, who had before been indicted "coram admirallo flotæ, quod navem prædictam de bonis, &c. felonice deprædarunt," and thereupon a *capias* issued to the sheriff to bring them *coram Rege ubicunque*, &c. to answer for the said crime, &c.

Mitch. 26 E. 3. Rot. 51. in dersu. coram Rege. Norfolk. *John Schindere* impleaded several persons, de *placito transmissis per billam*, for entering his ship *juxta restorari maris de North'lenn*, beating and wounding him, and plundering the ship, *quam in mari prædicta reliquerunt in deperatam, per quod navis prædicta fessit omnino*; and recovered 360 marks against them, for the damages fullained thereby.

Trin. 34 E. 1. Rot. 34. coram Rege. Norfolk. Several merchants of *Lincoln* put on board a ship wool and other commodities for *Brabant*, to the value of 896*l.* 10*s.* The ship in its passage was entered in a hostile manner in the port of *Gerses* in *Zealand*,

and

court of king's bench had certainly a concurrent jurisdiction with the admiralty, in cases of felonies done upon the nar-

row

and plundered by the subjects of the earl of *Hainault*: satisfaction had been demanded of the earl for this depredation in vain; and thereupon, at the suit of the said merchants of *Lincoln*, a writ was directed to the bailiffs of *Lynn* to seize *omnia bona*, &c. of the merchants of *Hainault*, and keep them till the *Lincoln* merchants had received satisfaction, or till farther order should be taken therein. To this writ the bailiffs returned, that the *Hainault* merchants had *nulla bona infra balliviam suam*: upon this a *Lincoln* merchant came into chancery, and alleged, that seizure had been made of goods to the value of 31*l.* 17*s.* by the said bailiffs, which they had redelivered to the *Hainault* merchants without warrant, and thereupon a second writ issued to the said bailiffs, ordering them to pay *inailatè* the said 31*l.* 17*s.* to the *Lincoln* merchants in part of their loss, or else to appear *coram Rege in æstibus Trin. ubiqueque, & interim* to seize *omnia bona*, &c. of the *Hainault* merchants, as before. It appears afterwards, *Mich. 15 E. 2. Rot. 142. coram Rege*, that the said earl of *Hainault* in the parliament, anno 4 E. 2 acknowledged himself *per nuncios suos*, to be indebted to the *Lincoln* merchants in the sum of 95*l.* on account of this depredation; 70*l.* of which was allotted to *Walter le Ken* one of them, in satisfaction for his loss; and at his suit a writ was directed to the sheriff, *quod levare faceret 70 libras de bonis*, &c. of the *Hainault* merchants, arrested by consent of the said earl of *Hainault* at *Yarmouth*, and bring the money into chancery. *ad satisfaciendum prædicto Waltero le Ken*: by virtue of which several sums of money were paid to him, *in parte debiti prædicti*.

Trin. 8 E. 2. 111. in dorso. coram Rege. Kanc. A mandate issues to the constable of *Dover*, and warden of the cinque-ports, to take into custody several persons, for entering a ship from *Flanders vi & annis*, laden with cloth and other goods, belonging to certain merchants of *Ipres*, "quos pannos abduxerunt, & mercatores ligaverunt, & imprisonaverunt, &c. ita quod habeat eos coram rege ad respondendum præfatis mercatoribus super præmissis, &c."

Mitch. 18 E. 2. Rot. 25. in dorso. coram Rege. Lincoln. The mayor and commonalty of *Grymesby* implead several persons "pro carcandis & discarcondis navibus apud *Villam de Cie*, infra quatuor leucas villæ *de Grymesby*," whereby the said corporation was damaged, and lost the custom due to them on all goods and merchandise,

"carcata, seu discarcata, infra quinque leucas villæ de *Grymesby*, in auxilium firmæ suæ de rege," and a precept issues to the sheriff to attach, and bring them *coram Rege*, to answer for the said offenses.

Mich. 12 E. 2. Rot. 17. Rex. The king signifies by writ to the justices of his bench, that precepts had issued to several sheriffs to attach certain persons, "quorum nomina sub pede sigilli sui eis misit, qui durante sufficientia inter subditos regis Angliæ, & comitis *Flandriæ*, quandam navem de *Flandria* diversis bonis & mercimoniis, ad valorem 2000 marcarum, carcatam, infra aquam de *Tyne* prope *Tynemuth*, vi armatâ ceperunt, & bona & mercimonia prædicta, &c. inter se partiti fuerunt." In consequence of which process it appears, *Rot. 18. ibidem*, that several persons were brought *coram Rege* by the sheriff of *Northumberland*; where they were impleaded by the king's attorney for having part of the said goods, "Et dicunt quod nihil ceperunt, &c. Et de hoc ponunt se super patriam." Upon which the king's attorney joined issue with them, and the court bailed them *de die in diem, quousque, &c.*

Trin. 25 E. 3. Rot. 22. Lincoln Rex, William Coupeman and Robert Fitz-William had been indicted, "coram vicecomite & custodibus pacis in comitatu *Linc.* Quod felonice deprædaverunt *Johannem Gryme de Kirkeby*, in mari apud *Fisshon-bord*; et quod de *Fisshon-bord* porrexerunt supra mare versus partes boreales, & in alto mari deprædaverunt, & demeruerunt octo batellas piscatorum, & sex homines in prædictis batellis existentes, felonice interfecerunt." The indictments were sent into the king's bench, and thereupon the said *William* and *Robert* were brought *coram Rege apud Aylesbury*, and responded, &c." But it appearing that both of them had been tried upon the said indictments before the justices of gaol-delivery at *Lincoln*, and acquitted; "Consideratum est quod iidem *Robertus & Wilhelmus* cant inde quieti."

Mich. 27 E. 3. Rot. 29. Rex. London. *Henry Pickard*, coroner of *London*, delivered with his own hand *coram Rege*, quosdam cognitiones *coram ipso factas* in the Tower of *London* by several persons, who confessed that they had feloniously entered a ship near *Feverisham*, thrown the men on board it into the sea, plundered it, and then sunk it; that they afterwards went from *Waxeryngg usque apud fooslong de Tenet*, and feloniously entered another ship there, strip-

ped,

row seas or coast, though it were high seas, because within the king's realm of *England*.

And as it was thus in the king's bench, so in this case special commissions to hear and determine offenses upon the coast, *secundum legem & consuetudinem regni Angliæ*, did often issue.

But indeed a general commission of *oyer and terminer* of felonies *infra comitatum*, &c. did not extend to misdemeanors upon the sea-coast, unless in those creeks and rivers and arms of the sea, that were within the body of the county.

So that even in these cases of felonies or treasons committed upon the sea-coast in the narrow seas, the king's bench or special commissions of *oyer and terminer secundum legem & consuetudinem regni Angliæ*, had a concurrent jurisdiction with the court of admiralty.

But this jurisdiction of the common law courts in cases of felonies and treasons, and other crimes committed upon the sea-coast, was interrupted by a special order of the king and his council, *Claus. 35 E. 3. m. 28. verso*, and by a *Supersedeas* that issued shortly after; and since *38 E. 3.* I have not observed, that the king's bench, or courts of the common law have proceeded criminally in cases of crimes of this nature committed upon the high sea.

But if any felony or treason was committed within any creek or arm of the sea, which was within the body of a county, the courts of the common law only had jurisdiction in such cases, and the admiral had no jurisdiction at the common law in such cases.

And thus far touching the jurisdiction of the admiral or maritime court at common law. [16]

2. But by the statute of *15 R. 2. cap. 3.* of the death of a man, or maihem in great ships hovering in the main stream of great rivers *below the bridges* (for so is the record, and not *below the points*) nigh to the sea, the admiral shall have jurisdiction.

ped it of what goods were on board, killed all that were in it except two women, and flung them into the sea; "Et quod fornicaverunt cum duabus mulieribus prædictis, quas quidem post tres dies clafpos felonice interfecerunt." Upon this four of the said criminals were immediately brought *coram Rege*, and being asked severally, why judgment should not pass upon them, "juxta cognitiones suas prædictas, nihil dicunt. Ideo consideratum est, quod trahantur, & suspendantur," As to two others, "quia curia

"nondum advisatur de procedendo ad judicium super eis," they were committed to the marshal, and afterwards removed to *Newgate* by the king's writ, being appealed, "coram Vic' & Coron' Civitatis London, by Allan de Credenon, de morte Thomæ de Credenon fratris sui, apud le forlonges in mari juxta insulam de Teneto in com' Kane' felonice interfecisti, super appello prædicto, secundum legem & consuetudinem regni Angliæ, responsuri."

This first gave the admiral jurisdiction in any river or creek within the body of the county, which only extends to the death of a man and maihem.

But yet observe, this is not exclusive of the courts of common law; and therefore the king's bench, or the general commission of *oyer and terminer* to hear and determine felonies, &c. in the county, have herein a concurrent jurisdiction with the court of admiralty.

And as well the coroner of the county, as of the admiral, may take inquisitions upon such deaths happening in great rivers, namely, arms of the sea, that flow and reflow beneath the first bridges. 8 *E. 2. Coron.* 399.

Only these things are observable. 1. That it extends only to rivers, that are arms of the sea, namely, that flow and reflow, and bear great ships. 2. It seems to extend only to such deaths as happen in those great ships, not in small vessels. 3. That by that statute this jurisdiction is annexed to the court of admiralty, and consequently they may proceed therein by proofs, according to the course of the marine law, and hold their session where they please, tho they did often, even before the statute of 23 *H. 8.* proceed by commission under the great seal, and by inquisition.

3. By the statute of 28 *H. 8. cap. 15.* the course of proceeding in criminal causes is settled in a different method, in which these things are observable, *viz.* 1. The things to which it extends, *treasons, felonies, robberies, murders, and confederacies.* 2. Where committed, *viz. in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or jurisdiction:* This seems to me to extend to great rivers, where the sea

[17] flows and reflows below the first bridges, and also in creeks of the sea at full water, where the sea flows and reflows, and upon high water upon the shore, tho these possibly be within the body of the county, for there, at least by the statute of 15 *R. 2.* they have a jurisdiction, and thus accordingly it hath been constantly used in all times, even when judges of the common law have been named and sat in their commission; but we are not to extend the words (*pretend to have*) to such a pretense as is without any right at all, and therefore, altho the admiral pretends to have jurisdiction upon the shore, when the water is reflowed, yet he hath no cognizance of a felony committed there; and therefore it was resolved, 25 *Eliz. Lacie's case,* 'That if a man be stricken upon the high sea, and die upon

upon the shore after the reflux of the water, the admiral by virtue of this commission hath no cognizance of that felony. 2 *Co. Rep. f.* 93. *a. Bingham's case*, 5 *Co. Rep. f.* 107. *a. Constable's case*, *Co. P. C. cap.* 7. *p.* 48. but of this hereafter. 3. The commission must be directed to the lord admiral or his lieutenant, and three or four others. 4. The proceeding and trial is to be according to the course of the common law, as if the offense were committed at land within the realm. 5. Their session is to be in such places and counties as shall be appointed by the king's commission; no challenge for default of hundreders. 6. The offender excluded from clergy; but *quære*, whether the statute of 1 *E. 6. cap.* 12. does not restore it even in this case, as some of the judges in *Alexander Poulter's case (d)* held? But my lord *Coke*, *P. C. cap.* 49. saith piracy is excluded from clergy: It seems to me, that as to all offenses but treason, and piracy, and murder, the offender is to have his clergy by the statute of 1 *E. 6. cap.* 12. 7. The hearing and determining being directed to be according to the course of the common law, if the prisoner stands mute, he shall have *peine fort & dure*. *Co. P. C. cap.* 49. *p.* 114. 8. This statute is not repealed by the statute of 35 *H. 8. cap.* 2. nor by the statute of 1 & 2 *P. & M. cap.* 10. 9. An accessory cannot be punished by this act, but may be punished by the admiral according to the marine or civil law. 10. An attainder upon this act [18] worketh no corruption of blood.

Thus far in general of this commission; only I shall add,

1. That touching piracy upon the sea at this day, it is commonly taken the common law hath no concurrent jurisdiction; and therefore if an accessory be at land to a piracy at sea, the commissioners upon this statute cannot try it because done at land, and besides the statute extends only to principals. *Co. P. C. p.* 112. nor can the common law try it, because piracy is not made felony, whereof the common law can take notice; Again, if *A.* commit a robbery at sea, and brings the goods to land within the body of a county, this is not felony triable by the common law, because the common law takes no notice of the original fact. *Co. P. C. p.* 113. *Butler's case* cited 23 *Eliz.*

2. That touching treason or felony committed upon the high sea, as the law now stands, it is not determinable by the common law courts, but only upon this statute.

(d) 11 *Co.* 21. b.

3. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction.

But *note* well, that besides this commission founded upon the statute of 28 H. 8. which extendeth only to treason, murder, robbery, and confederacies, there is, and for above these hundred years last past there hath been in the same commission, a common law commission of *oyer and terminer*, and also a commission of the peace and gaol-delivery for all offenses against any penal laws *super mare, vel infra fluxum maris ad plenitudinem maris*; and also of all treasons, murders, felonies, &c. *super mari vel aliquo rivo, portu, aqua dulci, crecâ, seu infra fluxum maris ad plenitudinem maris, à quibuscunque primis pontibus versus mare & super littus maris, &c. secundum stylum & consuetudinem regni Angliæ & curiæ admiralitatis*, and limits the county of their session and inquiry. This may be seen at large in 25 Eliz. in *Lacy's case (e)*.

But then for so much as lies within the body of any county, their
[19] commission is a commission of the peace, gaol-delivery, and *oyer and terminer*, and consequently plain commissions at common law, and their sessions ought to be within the county where the fact inquirable is to be inquired, because it is but a special commission at common law.

The case of *Lacy* was thus:

Die Lunæ in quartâ septimanâ Quadragesimæ 23 Eliz. at the castle of *York*, there was a general session by commission of gaol-delivery and *oyer and terminer* for the county of *York* directed to baron *Chute* and others.

At this session *Ambrose Lacy* and others were indicted of the murder of *Richard Peacock*, supposing the stroke given 5 August 22 Eliz. and the death 6 August 22 Eliz. both supposed to be at *Scarborough*, in *commitatû Eboracensi*.

This indictment was delivered into the king's bench *in mense Martii* following, and *Lacy* appearing in the king's bench was thereupon arraigned: he pleaded that the place, where *Richard* was stricken and after died, was called *Scarborough-sands*, and that it is and at the time of the stroke & *continuè postea fuit locus infra fluxum & refluxum maris infra plenitudinem ejus in Scarborough prædictâ, & parcella portûs de Scarborough*, and that within that place the admirals 28 H. 8. & *semper tam antea, quam postea habebant & prætendebant habere juris-*

diffionem; then shews the letters patents of *oyer and terminer* to baron *Chute* and others within the counties of *York, &c.* according to the usual form, which was delivered to baron *Chute* and the rest 18 *Feb. 23 Eliz.*

That afterwards 25 *Feb. 23 Eliz.* the commission upon the statute of 28 *H. 8.* including also the commission of gaol-delivery, *oyer and terminer*, and the peace, *ut supra*, issued to the earl of *Lincoln*, lord admiral, and divers others, *&c.* to inquire, hear and determine, and deliver the gaol of all murders *tàm super mare vel aliquo rivo, portû, aquâ dulci, crecâ, seu loco quocunque infra fluxum maris ad plenitudinem à quibuscunque primis pontibus versus mare, quàm super littus maris & alibi ubicunque infra jurisdictionem nostram maritimam & jurisdictionem curiæ admiralitâtis, &c.*

That this commission was delivered to the lord admiral, *&c.* 26 *Feb. 13 Eliz.*

That afterward and before the inquisition before baron *Chute, &c.* the lord admiral gave notice to the said baron [20] *Chute* of that commission.

And that after that notice, *viz. 6 Martii in quartâ septimanâ Quadragesimæ* this inquisition was taken before baron *Chute, &c.* upon which he is now arraigned.

Then he shews, that 2 *Martii 23 Eliz.* the lord admiral, *&c.* issued their precept to the sheriff of *York* by virtue of the second commission, and thereupon an indictment was found, that *Ambrose Lacey* killed *Peacock se defendendo*, and set forth the special manner, and avers that it is the same death, and that the *locus, in quo* the stroke was given, was called *Scarborough-sands infra fluxum & refluxum maris ad plenitudinem ejus, & parcella portûs de Scarborough*; and that the admiral 28 *H. 8. ac continuè postea & antea habebat vel pretendebat habere jurisdictionem, & sic dicit quòd inquisitio coram baron Chute fuit void.*

The king's attorney demurred, and *Mich. 26 Eliz.* judgment was given, *quòd eat sine die.*

Which judgment doth not at all enforce, that the admiral had jurisdiction by the statute of 28 *H. 8.* in this case, where a murder was committed in a port, or a stroke given at high sea, and a death upon the sands; but only this second commission extending so large, namely upon the sea-shore and in the ports, did for so much repeal the

former commission in the county at large; for *that* second commission was in part a common law commission, as hath been said.

And therefore I take it to be true, that if a man be stricken upon the shore at full sea, and die upon the shore at low water, this is not within the statute of 28 *H.* 8. nor within a general commission of *oyer* and *terminer* in the county, but yet I do not think it is to be determined by the constable and marshal, as my lord *Coke*, *ubi supra*, intimates, but it may be determined in the king's bench sitting in the county, where the party died, or by a special commission of *oyer* and *terminer*.

[21] III. The third kind of special commission is, that which is limited to particular places, that are not counties: Such are the commissions of *oyer* and *terminer*, and likewise of gaol-delivery, or the peace limited and granted within certain corporations or boroughs; nay, I think it may be granted to particular rivers, tho they extend to several counties, but then every county must have a particular session of its own, for so much of the river as is within the precinct of that county.

If the king issues a commission of *oyer* and *terminer* or gaol-delivery to any city or town not being a county, if a general commission afterwards issues for the whole county, this second commission after notice or a session by virtue thereof determined and superseded the special commission; but this is remedied by the statute of 2 & 3 *P. & M.* cap. 18. whereby it is enacted, that such a special commission shall not be determined by the granting or sitting of a general commission in the county at large.

IV. Special commissions of *oyer* and *terminer* may be made for some special offenses: And such were antiently very usual, as touching labourers, weights and measures, and the like; for as a general commission may be to hear and determine all offenses, so it may be for particular offenses.

V. Special commissions to hear and not to determine offenses: Tho by force of some particular statutes such commissions of inquiry may issue, as upon the statute of 23 *H.* 6. cap. 10. of sheriffs and some others, yet regularly as to matters of misdemeanor, especially such as are capital, as felony or treason, no such commission of inquiry only is warrantable: *Vide T. 5 Jac. 12 C. Rep. p. 31.*

VI. A commission to determine and not to inquire: Regularly in all

all commissions *ad audiendum & terminandum* the commissioners ought to proceed upon indictments before themselves; *de quæ infra*.

But it hath been not unusual in cases, especially of treason, that where an indictment is taken before justices of *oyer* and *terminer* for an offense committed in the proper county, a special commission may issue to determine that indictment in another county, but [22] then upon *not guilty* pleaded the same must be tried before these second commissioners, by men of the county where the offense was committed: *Vide Co. P. C. p. 27. Plowd. Com. 390. Casus com' Leicester and Somervill's case, &c. (f)*.

I shall not instance farther touching special commissions: Some acts of parliament have directed commissions of this nature, as upon the statute for treasons and felonies committed in another county by the statute of 33 *H. 8. cap. 23.* (which, tho repealed as to treasons by 1 & 2 *P. & M. cap. 10.* yet stands as to murders, and *vide Crompt. fol. 22. a. Grevill* examin'd before the council was arraigned for murder in another county upon this statute (*), and standing mute was pressed,) and upon the statute of 35 *H. 8. cap. 2.* of foreign treasons.

Et hæc dicta sunt de special commissions d' oyer and terminer.

See Index to 2 Hawk. P. C. tit Oyer and Terminer. 4 Blackf. Com. ch. 5. p. 71. Foster. 1.

CHAP. IV.

Concerning general commissions of oyer and terminer.

JUSTICES of *oyer* and *terminer* are of two kinds, *viz. Justiciarii ordinarii*, such is the court of king's bench, the supreme ordinary court of *oyer* and *terminer*, and is comprised within the statutes, that give power to justices of *oyer* and *terminer*, as hath been already said.

The delegate or commisionate justices of *oyer* and *terminer* are those, who are by commission, which usually is granted in the circuits directed to justices of assize and divers others, or any three of them, whereof commonly one of the justices of assize is of the *quorum*; and it is *ad inquirendum per sacramentum proborum & legalium hominum* [23] of the several counties *de quibuscunque prodicionibus, &c.* and divers other offenses therein mention'd, *ac de omnibus injuriis &*

(f) 1 And. 107.

(*) This case was M. 31 Eliz.

malefactis quibuscunque in comitatibus Bucks, &c. eaque omnia audiendum & terminandum, facturi inde quod ad justitiam pertinet secundum legem & consuetudinem regni Angliæ, &c. and this to be done *tam infra libertates quam extra.*

This commission is specially called a commission of *oyer and terminer*; and therefore, altho justices of peace have a clause in their commission *ad audiendum & terminandum* felonies, &c. yet justices of peace come not under the name of justices of *oyer and terminer* within those acts of parliament, that mention justices of *oyer and terminer*; as upon the statute of 5 *Eliz. cap. 14.* for forgery, as shall be said farther hereafter in the chapter of justices of peace, 9 *Co. Rep. 118. b.* lord *Sanchar's* case, *Co. P. C. cap. 41. p. 103.*

But the justices of the court of king's bench are the sovereign ordinary commissioners of *oyer and terminer*, as hath been before said.

My lord *Coke* in his 4 *Instit. cap. 28 & 30.* hath laid together the learning of the courts of *oyer and terminer* and gaol-delivery, whose method I shall follow

Commissioners of *oyer and terminer* before their sessions, issue a precept to the sheriff much of the same form as commissioners of gaol-delivery do; see the form thereof, *Rast. Entries 443. b.* title *oyer and terminer. 1 E. 3.*

1. The justices of *oyer and terminer* in criminal causes cannot be by writ, but must be by commission under the great seal; otherwise their proceedings are void. 42 *Affiz. 12.*

2. Both in commissions of *oyer and terminer* and of gaol-delivery, and other commissions of like nature directed to one or more, there may be additional commissions of association, and thereupon writs are to issue to the former commissioners *de admittendo in societatem*; and if all cannot attend the session, a writ of *Si omnes interesse non possitis, tunc vos tres vel duo vestrum, quos præsentem esse contigerit, (quorum aliquem vestrum, A. B. vel C. D. unum esse volumus,) ad præmissa faciend' intendatis. &c.* Vide *F. N. B. p. 111, 112.*

[24] 3. Justices of *oyer and terminer* or gaol-delivery, if they once sit without adjournment, their commission is determined; but tho they be appointed only *pro hac vice*, yet they may continue their sessions from day to day by adjournment; the like for all other commissions.

But it is not always necessary nor usual to enter their adjournment on record, (tho it might be fit in many cases,) and then if it be not entered,

entered on record, their session always relates to the first day, and so are their records entered as of the first day of the session.

But in some cases it is absolutely necessary to enter their adjournments on record, as where an indictment is taken the first day of the session before *oyer* and *terminer*, and they make a precept to the sheriff to return a jury the next day, or at any following day, upon the prisoner's plea of not guilty, there must be a record made of the adjournment of the sessions to that day, otherwise it will be erroneous, (because without such entry the whole sessions will be supposed in law to be held the first day,) and out of the sessions; the like for justices of peace.

So if after the first day of the sessions either of *oyer* and *terminer*, or gaol-delivery, there be a felony committed, and the party indicted for it, there must be an entry of the adjournment, at least till the day of the indictment taken, because otherwise the felony will be supposed in law to be committed after the determination of the sessions. 14 Car. 1. *Sampson's case* (a).

4. Commissions of *oyer* and *terminer*, gaol-delivery, and regularly all other commissions are determined by one of these four ways. 1. By a session and non-adjournment, as before. 2. By the king's death: yet it is held, tho in strictness of law the commissions be determined by the king's death, so as no proclamation without an act of parliament can give them continuance, but they must have new commissions, *Croke*, 1 Car. 1. p. 1. yet the acts they do by virtue of these commissions after the king's death, and before notice thereof, stand good. *M.* 3 Car. C. B. *Croke*, p. 97; 98. in *Sir Randolph Crew's case* (*). 3. By express *Superfedeas* by a writ; but this *Superfedeas* by writ, tho it be a *Superfedeas omnino*, yet [25]

(a) *W. Jones*, 420.

(*) But now by 7 & 8 W. cap. 27. and 1 Ann. cap. 8. it is enacted, "That no commission either civil or military, That no patent or grant of any office or employment either civil or military, That no commission of assize, *oyer* and *terminer*, general gaol delivery, or of association, writ of admittance, writ of *fi non omnes*, writ of assistance, or commission of the peace shall be determined by the demise of any king or queen of this realm, but shall continue in full force for six months next ensuing notwithstanding such demise, until superseded and determined by the next successor: And also no original writ, writ

" of *Nisi prius*, commission, process, or proceedings whatsoever in, or issuing out of any court of equity, nor any process or proceeding upon any office or inquisition, nor any writ or *Certe* or *Habeas Corpus* in any matter or cause either criminal or civil, nor any writ of attachment, or process for contempt, nor any commission of delegacy, or review for any matters ecclesiastical, testamentary, or maritime, or any process thereupon shall be determined, abated or discontinued by the demise of any king or queen of this realm, but shall remain in full force, as if such king or queen had lived.

is not an absolute repeal of the commission, but only a suspension, for it may be renewed again by a writ of *Procedendo*, 12 *Affiz.* 21. adjudged. 4. By the issuing a new commission of the same nature in the same county, and notice thereof.

And therefore before the former commission be determin'd, there must be notice, which is, of three kinds. 1. By shewing the new commission; this determines the former, as to all those and those only to whom it is shewn. 2. By a proclamation of the latter commission in the county; this determines the former commission wholly. 3. By a session in the county by force of the latter commission in the county. *Coke*, 4 *Instit. cap.* 28. p. 165.

If a general commission of *oyer and terminer*, gaol delivery, or the peace, issue for the county at large; and afterwards a special commission of the like nature for one town, or for the *loca maritima* of that county, this new commission, with notice as before, doth determine the general commission *pro tanto*. 25 *Eliz. Lucie's case*, 1 *Leon.* n. 363. p. 270. & *supra*, cap. *præcedente*.

And so *à converso*, if a special commission of *oyer and terminer*, gaol-delivery, or the peace, issue for a particular town or city, not being a county, or for the *loca maritima*, a general commission of like nature in the county, with such a notice as before, de-
[26] termines the special commission: But by the statute of 2 & 3 *P. & M. cap.* 18. this is helped as to special commissions in cities and towns corporate, as hath been before said; but *that* statute is to be intended only of towns or cities, as it seems, (*quare*) and extends not to commissions of *oyer and terminer*. 4 *Co. Instit.* p. 165. *in margine*.

But if there be a general commission of *oyer and terminer*, or gaol-delivery, or peace for the whole county, and a special commission of the same nature to a liberty, hundred, or other precinct, as in a hundred, liberty, or franchise within the county, and both bear *teste* the same day, they all stand. Thus it is in *Suffolk*, where there have been always three commissions of gaol-delivery to the justices of assize, one for the county at large, another for the franchise, another for the town of *Bury*, and they impanel several grand juries, and sit and act respectively by each commission.

And the justices of gaol-delivery in the franchise must sit in the franchise by the statute of 27 *H. 8. cap.* 24. and the reason is, because antiently the abbots of *St. Edmund's-Bury* did by virtue of the king's letters patent,

patent, constitute their own justices of gaol-delivery in the franchise and town; and therefore the sessions of gaol-delivery is fittest to be held at *Bury*; but the commission of *oyer* and *terminer* extends *tam infra libertates, quàm extra*; but of this *vide cap. prox.*

But a commission of one nature doth not supersede a commission of another nature, as a commission of *oyer* and *terminer* is not repealed by a subsequent commission of gaol-delivery or the peace, nor *à converso*, for they are of several natures. 3 *Mar. B. Commission* 24.

These things before-mentioned are common to all judiciary commissions; these that follow, more particularly concern general commissions of *oyer* and *terminer*.

1. Regularly upon the commission of *oyer* and *terminer* there should issue a precept to the sheriff in the name of three commissioners at least, whereof one of the *quorum*, and under their particular seals, bearing date fifteen days at least before their session, to the sheriff to return twenty-four for a grand inquest *ad inquirendum, &c.* [27] at such a day; and the sheriff is to return his pannel annexed to the precept.

2. Regularly the commissioners of *oyer* and *terminer* cannot proceed upon any indictment taken before others than themselves. 3 *Mar. B. Commission* 24. And therefore they cannot proceed upon the coroner's inquest, or upon an indictment of felony before justices of peace.

But this rule hath two exceptions. 1. That it is only intended of a general commission of *oyer* and *terminer*, for, as hath been shewn, there may be a special commission to determine a treason or felony taken before other commissioners of *oyer* and *terminer*, *Plowd. Com. p. 390. Casus com' Leicest.*; nay, or by the coroner or justices of the peace. 2. That it doth not extend to an inquisition taken before other commissioners of *oyer* and *terminer*; for it is and always hath been the constant practice to take indictments before commissioners of *oyer* and *terminer*, as for highways, barrettry, forgery, perjury, &c. and to try them before other commissioners of *oyer* and *terminer* at another subsequent sessions; and if there were any doubt of that at common law, yet the statute of 1 *E. 6. cap. 7.* hath settled it, *viz.* “ That no process or suit made before the justices of assise, gaol-
“ delivery, *oyer* and *terminer*, justices of peace, or any the king's
“ commissioners, shall be in any wise discontinued by making or
“ publishing any new commission or association, or by altering the

“ names of the justices ; but the new justices of assise, gaol-delivery
 “ and the peace, or other commissioners may proceed in every be-
 “ half, as if the old commissions, justices and commissioners had still
 “ remaind and continued not alterd.

And this gives power to the justices of *oyer and terminer*, &c. to proceed upon indictments taken by former justices of *oyer and terminer*, as well in cases of treason or felony, as other misdemeanors.

3. In case where a felon or traitor, &c. pleads to an indictment taken before justices of *oyer and terminer*, they ought not, (as in case of justices of gaol-delivery,) to award a precept *ore tenus* to the sheriff to return a jury, but it must be by precept in the names [28] and under the seals of the commissioners, or three of them, whereof one of the *quorum*. 4 *Co. Instit. cap.* 30. *p.* 168. & *ibidem cap.* 28. *p.* 164. and the sheriff ought to return the pannel filed to the precept.

4. But the indictment may be preferred, issue joined, precept made and returned, and prisoner tried the same day before commissioners of *oyer and terminer* : see the precedents cited 4 *Co. Instit. cap.* 28. *p.* 164. *P.* 16 *Car.* 1. *B. R. Croke* 583. resolved *per omnes Justiciarios Angliæ*, altho there were no commission of gaol-delivery in that case, but only of *oyer and terminer*. *Accords H.* 9 *Car. B. R. Chapman's* case for barrettry before justices of *oyer and terminer*. 2 *Roll. Abr. p.* 96. And the same law is questionless for justices of gaol-delivery. *T.* 9 *Car. B. R. Croke* 315.

But in cases of justices of the peace it hath been held, that they cannot try the same session that the party pleads to the indictment, much less the same he is indicted. 22 *E.* 4. *Coron.* 44. *H.* 11 *Car.* 1. *B. R. Croke*, *p.* 438 & 448. adjudged in cases not capital, *Bumpsted's* case in an indictment of extortion, and accordingly ruled *T.* 23 *Car. B. R. Pue's* case for seditious words. 2 *H.* 8. *Kelw.* 259.

But yet it hath been held good even before justices of peace to receive an indictment, and put the party, if present, to plead to it, and try it the same sessions, *T.* 14. *fac. B. R. Cro.* 404. *Rice's* case adjudged good, 4 *Co. Instit. cap.* 28. *p.* 164. *without question they may* : And there can be no difference assigned between sessions of the peace and *oyer and terminer* in this case, nor between causes criminal and capital. for the offenses rise in the same county, and as there goes out a summons of gaol-delivery, so there issues a general summons

mons of the sessions of the peace; and that all constables, &c. then attend; *quod vide Crompt. de pace, f. 232. a. 2 Co. Instit. super Articulis, cap. 15. p. 568.*

Yet in respect of this contrariety of opinion, the use hath commonly obtaind, that in cases not capital both before justices of *oyer* and *terminer*, and of the peace, he that traverseth an indictment, hath time to try it till the next session; but where the party is in prison, the justices of gaol-delivery put him to answer, and [29] try it presently.

But in all treasons and felonies, as well before justices of *oyer* and *terminer* or of peace, as well as before justices of gaol-delivery, the constant course is to indict the party, put him to plead, try him and give judgment, and all at the same sessions; and it is fit to hold the course according to the modern usage; but it seems to me, that in all cases criminal or capital, justices of *oyer* and *terminer* may *de rigore juris* proceed to indictment, trial and judgment the same sessions.

5. The court of the general commissioners of *oyer* and *terminer*, as likewise that of the gaol-delivery and of assize, comes under the name of a court of record in relation to those offices, that by act of parliament are directed to be punished in any court of record; as the statute of 5 & 6 E. 6. cap. 14. of forestallers, &c. and the statute of 33 H. 8. cap. 9. of unlawful games, by the opinion of my lord Coke, 4 Instit. cap. 28. p. 164. and according to him, if it be limited to be punished in any of *his majesty's* courts of record.

But there is a great authority against this, and that in such cases, especially the latter, it only extends to the four great courts at *Westminster*. as upon the statute of drapery, 4 & 5 P. & M. cap. 5. which is, that the penalties of that act shall be recoverd by action, bill, plaint or information, or otherwise *in any court of record*, wherein no essoin, protection, wager of law, or injunction shall be allowed; this extends only to the four courts of *Westminster*, Gregory's case, 6 Co. Rep. f. 19. b. of tillage, labourers, &c. (c) *to be recoverd in any of the queen's courts of record*, by the opinion of all the judges except Catlin, Sanders and Whiddon, extends only to the four courts of *Westminster*, and not to commissioners of *oyer* and *terminer*; but otherwise it is, if no court be appointed. M. 6 & 7 Eliz. Dy. 236. a.

(a) 5 Eliz. cap. 4.

Again, by the statute of 23 *H. 8. cap. 4.* against brewers for selling beer by less measure than is appointed by the act, the penalty [30] half to the king half to the informer, to be recovered by action of debt, bill, plaint, or information in any of the king's courts, wherein no wager of law, essoin, protection or privilege shall be allowed, *T. 4 Car. C. B. Crok.*, p. 112. *Farrington's case*: Ruled, that notwithstanding the statute of 21 *Jac. cap. 4.* this information lies in the common bench, because the justices of *Nisi prius*, *oyer and terminer*, or of the peace, or gaol-delivery cannot hold plea upon this statute, because these justices cannot allow an essoin or protection; and the statute of 23 *H. 8.* extends only to such courts as can allow a protection, &c. and accordingly I have known it resolved upon the statute of 7 *E. 6. cap. 5.* for wines; and about 23 *Car. 2.* it was resolved upon a writ of error in the exchequer-chamber, upon a judgment given in the exchequer for *Foly* a defendant in an information upon the statute of 1 *Eliz. cap. 15.* (whereby the cutting of timber within fourteen miles of a navigable river is prohibited on pain of forfeiting of forty shillings for every tree, a moiety to the queen, and a moiety to the informer, to be recovered by original writ, bill, plaint or information, wherein no essoin, protection, wager of law, or injunction shall be allowed,) that this extends not to the commissioners of *oyer and terminer*, nor other courts in the country, but only to the four courts at *Westminster*. 1. Because original writs are not returnable before them. 2. They cannot allow or disallow protections or essoins; whereupon the judgment for costs was affirmed; and yet here is no mention of any court, or court of record, or his majesty's courts, but purely upon these two reasons.

And yet I believe hundreds of informations have been before justices of *oyer and terminer* and *assise*, yea and of the peace in the country upon several acts, that have the like clauses, as 35 *H. 8. cap. 7.* for the preservation of woods, and infinite others according to my lord *Coke's* opinion, but when it hath come to be judicially debated, I have not known it to obtain; but the resolution in *Farrington's case* and in *Gregory's case* have still been allowed.

[31] 6. Commissioners of *oyer and terminer* cannot assign a coroner to an approver, nor justices of peace, but justices of gaol delivery may. 4 *Co. Instit.* p. 165. *Stamf. P. C.* p. 143. b.

7. By the statute of 5 *E. 3. cap. 11.* justices of *oyer and terminer* may issue process of outlawry in any county of *England* against persons

persons indicted before them, and also a *capias utlegatum* against persons outlawed.

8. By the statute of 9 E. 3. *cap.* 5. justices of *oyer and terminer*, gaol-delivery, and assize are to send their records and processes determined and put in execution to the exchequer at *Michaelmas* once every year under their seal, to be kept by the treasurer and chamberlains, but are to take out their *estretes* first.

9. All the precepts and processes of justices of *oyer and terminer* regularly are to be in the names and under the seals of the justices (*viz.* three of them, one of the *quorum*); and altho at this day there is no other warrant for the execution of prisoners condemned, but a calendar left with the sheriff under the hand of the justice that sits, yet antiently there was a warrant under their hands and seals, and in the names of the commissioners. *Co. P. C. p.* 31.

But if the prisoner be in custody of the sheriff, the truth is, there is no need of any warrant or calendar, for the open pronouncing and entering of the judgment *Suspendatur* is a warrant for the execution, and so it is in the king's bench, the entry on record of the judgment with a *præceptum est marescallo quodd faciatur executionem periculo incumbente*, without any formal writ or precept of the court is sufficient, and more is not usual: and the calendar subscribed by the judge of gaol-delivery is but a memorial; and *Rolle* would never sign any calendar, but gave his orders openly in court with a charge to the sheriff and gaoler to take notice of them.

More may occur touching these matters in the next chapter.

See Index to 2 Hawk. P. C. tit. Oyer and Terminer.

CHAP. V.

[32]

Touching justices of gaol-delivery.

THIS court is by commission under the great seal directed commonly to five or any two of them, *quorum aliquem vestrum A. B. vel C. D. unum esse volumus ad gaolam nostram comitatûs nostri S. de prisonibus in eâ existentibus deliberandis*; see the whole tenor of the commission. 4 *Co. Instit. cap.* 30. *p.* 168.

1. By

1. By the statute 8 R. 2. cap. 2. no man of law shall be justice of assise or common deliverance of the gaol in his own country; this statute is expounded by 33 H. 8. cap. 24. to be meant of the county, where he dwelleth; and as to justices of assise a penalty of one hundred pounds is added, if he exercises that office in the county where he is born or doth inhabit; but both these acts are usually dispensed with by a special *non obstante*.

By a special privilege by charter granted to the city of London the lord mayor is of the *quorum*, 2. R. 3. 11. a. and so it is in the city of Norwich.

2. Justices of gaol-delivery may proceed against prisoners (if in gaol) upon inquisition before the coroner or any other justices; and therefore justices of peace must send in their indictments not determined unto the justices of gaol-delivery to be proceeded upon, whether they be felonies or trespasses, if the party be in gaol or set to bail. Stat. 4 E. 3. cap. 2.

3. The justices of gaol-delivery after their commission sealed do, or should issue a precept to the sheriff importing these things, viz.

1. That upon such a day and place, *Venire facias omnes prisiones in prisonâ domini regis com' prædict' existentes vel per ipsum per manucapcionem dimiss. cum eorum attachiamenis & omnibus aliis eorum deliberationem tangent' & penes se remanent'*. 2. *Quod Venire facias at the day and place 24 legales homines de quolibet hundredo & inquirendum pro domino rege & corpore comitatûs prædicti.* 3. *Ac alios 24 probos & legales homines de comitatu prædicto ad faciendam juratam inter dominum regem & prisiones prædictos.* 4. *Et proclamari facias dictam deliberationem gaolæ in omnibus civitatibus, burgis & aliis locis, quod omnes, qui sequi voluerint versus prisiones prædictos pro domino rege vel se ipsis, adtunc sint ibi in formâ juris prosecuturi.* 5. *Scire facias etiam omnibus Justiciariis ad pacem comitatûs prædicti, coronatoribus, capitalibus constabulariis pacis, majoribus, ballivis, senescallis magnatûm, ballivis hundredorum & libertatûm, quod tunc sint ibi ad faciendum quod ad officium suum pertinet, & tu adtunc sis ibi unâ cum ballivis & ministris suis ad faciendum ea, quæ tuo & eorum officio incumbunt.* 6. *Et habeas ibi tam nomina Justiciariorum ad pacem, coronatorum, capitalium constabulariorum pacis, senescallorum magnatûm, ballivorum hundredorum & libertatûm, quàm juratorum prædictorum, & hoc præceptum.*

This

This precept is made in the king's name, or in the name of the justices of gaol-delivery, *Vide formam inde Rastl. Entries, p. 385. a. Gaol-delivery 1. Venire facias de quolibet hundreds 24 tam milites, quàm alios (*) & de qualibet villatâ, ubi dicti prisiones indictati existunt, quatuor homines & præpositum ad faciendum ea, quæ ex parte domini regis tunc ibidem injungentur.*

This is not unlike the summons of the *Iters* formerly, nor altogether unlike the summons of the sessions of the peace, *quod vide Crompton de Pace, p. 232. a.* which is in the king's name, and so may this, with the *Tefle* of the chief justice: Or it seems it may be in the name of the justices of gaol-delivery and under their seal; *vide simile in Holcroft's case, Co. Entries 55.* by the justices of gaol-delivery for the verge; this precept is accordingly returned, the justices of peace, coroners, mayors, bailiffs of hundreds, and liberties, constables of hundreds, and names of the grand inquest returned and called in order.

4. And therefore it hath never been a question, but that the justices of gaol-delivery may take an indictment, try, [34] and give judgement the same day. *22 E. 4. Coron. 44.*

5. But altho this solemnity of summons of the gaol-delivery may be, and should be used, yet they may command the sheriff *ore tenus*, to return a pannel without any precept in writing to him, (as is necessary in case of justices of *oyer and terminer*,) and the reason is given, because there is a general command to the sheriff by the summons of the gaol-delivery to return twenty-four to try prisoners. *4 H. 5. Enquest 55. 4 Co. Inslit. cap. 30. p. 168.*

6. They may deliver by proclamation persons imprisond, where either no indictment is preferd, or an indictment preferd and *ignoramus* found, which is said cannot be done by justices of *oyer and terminer*, or of the peace. *2 R. 3. Corone 47.*

7. They may originally take indictments of felony of such prisoners as are in gaol; this hath been accordingly resolved and is the constant practice, and so may justices of *oyer and terminer*: So that when the prisoner is in gaol, both have a concurrent jurisdiction. *4 Co. Inslit. cap. 30. p. 168 & 169.* and accordingly it was resolved in the case of *Apharry and Morgan, P. 29 Eliz.* there cited. And therefore the case of *3 Mar. B. Commission 24. and Pasch. 32 Eliz.*

(*) The words in *Rastal* are *libros & legales homines.*

B. R. Purfell's case, Croke, n. 10 p. 179. wherein it is said, that justices of gaol-delivery cannot take an indictment, unless they be also justices of peace, and then they may take an indictment as justices of peace, and try him as justices of gaol-delivery, is to be intended, where the offender is at large and out of prison, for if he be in prison, the indictment against him may be taken before them as justices of gaol-delivery, or as justices of *oyer and terminer*, or of the peace.

8. And therefore justices of *oyer and terminer*, gaol-delivery, and of the peace may make up their record by all three of the powers; and if it be good by one commission or by the other, it is good and not erroneous, and the best shall be taken for the king. 9 *H. 7. 9. a. 3. Mar. B. Commission 24. Crompt. Jurisdiction de Courts 226.*

[35] 9. If a person be let to bail, yet he is in law, in prison, and his bail are his keepers, and therefore the justices of gaol delivery may take an indictment against him, as well as if he were actually in gaol; but he that is let to mainprise is not in custody, 21 *H. 7. 33. a. 9 E. 4. 2. a. 39 H. 6. 27. b.* in the one case the entry is *traditur in ballium.* in the other *deliberatur per manucapcionem.*

10. They may take an indictment against persons for high treason, if they be in gaol, and may try and give judgment upon them, as well as commissioners of *oyer and terminer* against the opinion delivered *H. 15 Jac. B. R. Bumpsted's case.*

This appears by the statute of 1 *E. 6. cap. 7. vide 4 Co. Instit. p. 169. & libros ibi,* and it is constant experience.

11. By the statute of 1 *E. 6. cap. 7.* the subsequent commissioners of gaol-delivery have power to give judgment upon a person reprieved after conviction, and altho it be made a *quere*, *Dy. 205. a.* whether they may as well award execution upon a judgment given by the former commissioners of gaol-delivery, &c. yet it seems to be without question they may. 1. Upon the very common law, if a person be indicted and outlawed for felony before justices of peace, yet if he be in prison the justices of gaol-delivery have power to award execution upon that outlawry, for they are constituted *ad gaolam deliberandam* 15 *H. 7. 5. b.* agreed, and certainly if there had been any doubt of that, the statute of 1 *E. 6.* would have made as special a provision for awarding execution upon a judgment given by former commissioners, as for giving judgment upon a conviction before them. 2. But if there were any doubt thereof at common law, yet the statute of 1 *E. 6. cap. 7.* hath sufficiently enabled them thereunto by the last clause thereof,

thereof, *viz.* that notwithstanding the altering of the commissions of assise, *oyer* and *terminer*, gaol-delivery, or the peace the new justices may proceed in every behalf, as if the old commissions or commissioners had continued not altered.

12. They may receive appeals by bill against any person being in gaol.

13. They may assign a coroner to an approver, and make out process against the appellee in a foreign county by the [36] statute of 28 E. 1.

14. The sheriff is to deliver unto the justices of gaol-delivery the names of all persons in gaol, or that are bailed or let to mainprise by him for felony by the statute of 3 H. 7. cap. 3.

15. If a statute limit specially an offense to be heard and determined by the justices of peace, as that of 3 H. 8. cap. 5. it is doubtful whether justices of gaol-delivery, yea of *oyer* and *terminer* may hear and determine it; but upon the statute of 7 H. 7. cap. 1. which speaks only of justices in the county, either the commissioners of *oyer* and *terminer* or gaol-delivery may hear and determine it.

16. By the statute of 3 H. 8. cap. 12. The justices of gaol-delivery or of the peace, have power in open session to reform all pannels returned before them, by putting out and putting in names of persons, which pannels so reformed, shall be accordingly returned by the sheriff: And *note*, this command is *ore tenus*.

And hence it comes to pass, that altho upon trials of felons in the king's bench, or *oyer* and *terminer*, if the prisoner challenge twenty peremptorily, as he may, so that there be not sufficient remaining of the pannel, there is to be a *Tales* granted by precept returnable as the case requires; yet before justices of gaol-delivery the prisoner gets no time by it, for the sheriff by the command of the court *ore tenus*, may enlarge the pannel without any formal precept: *Vide Stamf. P. C. Lib. III. cap. 5. fol. 155. b.* and therefore *Tales* are not granted by precept before justices of gaol-delivery, which much expedites all business before them.

17. By the statute of 9 E. 3. cap. 5. The records before them determined are to be delivered to the treasurer and chamberlains of the Exchequer at Michaelmas yearly.

18. By the statute of 34 H. 8. cap. 14. The clerks of the crown, clerks of assise, and clerks of the peace are to certify into the king's bench

bench the names of all persons outlawed, attainted, or convicted, and
 [37] upon letter from the justices aforesaid certificates shall be made
 of such persons outlawed, attain, or convict, to the justices
 of gaol-delivery.

19. Justices of gaol-delivery may send prisoners by *Habeas Corpus* to the sheriff of another county, and a precept to the sheriff of that other county to receive them, namely, for a felony committed in that county, tho that county be out of the circuit of the justice that sends them; and tho I once knew it scrupled, yet I think the law is clear in it; *vide* 1 & 2 P. & M. cap. 13. in fine; for of necessity the justices of gaol-delivery have in some cases power out of the precincts of their county or circuit; as where an approver appeals a person in a foreign county, and this is certified, as it ought, to the justices of gaol-delivery, where the approver is, the justices of gaol-delivery, may make out process of *capias*, and it seems also of *exigent* against the appellee, and yet he is neither in gaol nor in the same county. 29 E. 3. 42. a. *Corone* 462.

But upon an inquisition before the coroner returned before justices of gaol-delivery they cannot make process of outlawry: *vide petitionem inde in parlamento*, 29 E. 3. n. 22. *sed non obtinuit*; but the answer was only, *Soit l' auncient ley sur ceo use*.

20. *A.* and *B.* are indicted before the justices of peace of *Middlesex*, and according to the statute of 4 E. 3. cap. 1. the indictment is delivered over to the justices of the gaol-delivery of *Newgate*: *A.* appears and is tried and acquitted, *B.* appears not. 1. The justices of peace cannot make out process against *B.* because the record is not before them. 2. The justices of gaol-delivery cannot make out process returnable before the justices of the peace, because another court. 3. By some opinions the justices of gaol-delivery may make out process to the outlawry returnable at the next sessions of gaol-delivery; but others thought they had no such power, for their commission is to deliver the gaol, and not to issue process against them that are out of gaol, neither can they proceed to the outlawry before themselves, as commissioners of *oyer* and *terminer*, because the indictment was taken before other justices, *viz.* of the peace: It was therefore held the

[38] entire record must be removed into the king's bench by *certiorari*, and from thence process of outlawry may go against *B.* T. 11. Car. B. R. 2 Rol. Abr. 96. *Storie's case*, who in this case

was

was outlawed before the justices of peace, and the outlawry therefore reversed.

21. By the statute of 26 *H. 8. cap. 6.* The justices of peace and gaol delivery in the counties adjacent to *Wales* have power to hear and determine counterfeiting, washing, or clipping of coin, murder, burnings of houses, manslaughter, robbery, burglary, rapes, and other felonies, and the accessaries thereof committed in *Wales*, or any lordship marcher, &c. as if committed in the same adjacent county: This is repealed as to treasons by the statute of 1 & 2 *P. & M. cap. 10.* but stands in force as to other felonies.

22. By the statute of 27 *H. 8. cap. 24.* The power of making justices of *eyre*, of assize, gaol-delivery, and of the peace in counties palatine and franchises is returned, and the same are to be made by letters patents under the great seal of *England*.

But they shall hold their sessions only within such franchises and liberties, and in none other places, as the justices of the said liberties lately have commonly used within the said liberties; and that no person within the said liberties be compellible by authority of this act to appear out of the same before other justices of assize, gaol-delivery, or of the peace, than those named by the king to sit within the said liberties.

By this statute, 1. These justices sitting within exempt franchises or counties palatine are now the king's courts and the king's justices, and therefore a *certiorari* issuing out of the king's bench to these justices sitting in *Durham* or the *cinque-ports* ought to be obeyed as by other justices out of franchises. 2. That yet where franchises of this nature were antiently granted to abbots to make justices of gaol-delivery to sit within franchises, as for instance in the franchise of *St. Edmunds-Bury*, there is a special commission of gaol-delivery for that franchise.

3. That this restriction of sitting within the franchise extends not to the commission of *oyer* and *terminer*, for that extends *tam infra libertates, quàm extra*, and therefore may sit out of a franchise, [39]

and determine misdemeanors within the franchise: And thus I did once in a session in the county of *Suffolk*, which by reason of sickness at that time, could not be held in *Bury*, *viz.* I kept the session for the whole county by virtue of the commission of *oyer* and *terminer*.

4. This resumption extends not to cities and boroughs, but they are specially excepted, and particular provision for the bishops of *Ely*,

Durham and York, to be justices of the peace only within their franchise.

23. By the statute of 6 *R. 2. cap. 5.* they are to hold their sessions in the principal towns, where the county-court is held; but this is but directive not coercive, for the judges may, and usually have appointed their sessions at their pleasure in other places.

4. Blackf. Com. ch. 19. p. 269. 270. See Index to 2 Hawk. Tit. Gaol-delivery.

C H A P. VI.

Touching the power of justices of assize and nisi prius, with relation to felony.

THE settled course of granting *nisi prius* was by the statute of 27 *E. 1. de finibus, cap. 3.*

By the construction made of that statute, if a man be indicted in the country, and that indictment removed by *certiorari*, and the body of the prisoner by *habeas corpus* into the king's bench, and there he pleads *not guilty*, after that statute and before the statute of 3 *H. 8. cap. 6.* the transcript of the record might be sent down by *nisi prius* to try that issue. 22 *E. 4. 19. 5 Mar. B. Coron. 231.* Statute 42 *E. 3. cap. 11. 4 Co. Rep. 43. b. Bibith's case.*

And the like may be done in an appeal, 21 *H. 7. 34. a. 2 & 3 P. & M. Read's case, Dy. 120. a. Rast. Entries in title Appeal per totum, 8 H. 5. 6. Coron. 463.*

[40] Upon the statute of 27 *E. 1. cap. 3.* and the statute of 14 *H. 6. cap. 1.* there hath been variety of opinions touching their power in cases of felony: Some have thought, that by virtue of those statutes they had originally a power to hear and determine felonies without any other commission, tho as to treason concerning coin, upon the statute of 3 *H. 5. cap. 7.* it is expressly directed, that they shall have a commission for the hearing and determining that offense; thus *Stamf. Lib. II cap. 5. f. 57 & 58.* Again, others have thought, that they have not any such original power without a special commission enabling them to hear and determine felonies originally; but that commission, as it seems by the statute of 27 *E. 1. cap. 3.* is called *a writ*, but is in truth no other than a commission, for all associations are commissions; and then the naming of them justices of
nisi

nisi prius is nothing else but the description of those persons, to whom commissions of gaol-delivery shall be directed, and so they are no other but justices of gaol-delivery.

Others have thought, and that truly, that the justices of *nisi prius* have not any original power of hearing and determining indictments of felony without a special commission for that purpose, but that by virtue of the acts of 27 E. 1. and 14 H. 6. they have a power to determine such felonies only, as are sent down to trial before them; as they have power by the statute of *Westm.* 2. (a) to give judgment in assises of *darrein presentment* and *quare impedit*, where an issue is brought down to trial before them, tho they have no power originally to hold plea in a *quare impedit*.

And that this was the meaning of the statute of 14 H. 6. cap. 1. and tho it speaks of all cases of felony and of treason, yet it is intended only of such felonies or treasons as were at issue and brought down before them to be tried by *nisi prius*, appears in this, that as to those points of treason, which were enacted by 3 H. 5. cap. 7. it is expressly enacted by that statute, that they shall have commissions to hear and determine them, and so as to those they needed not the aid of a new statute to enable it.

Now as to the usage thereupon.

1. In case of appeals. If issue be joined and sent down by *nisi prius* to be tried, antiently indeed they did not proceed to judgment; but if the defendant, were acquitted, they did by the same jury inquire, 1. Of the damages. 2. Of the sufficiency of the plaintiff. 3. Of the abettors; and this inquest being returned into the king's bench, there judgment and execution were made, *quod vide* 8 H. 5. 6. *Coron.* 463. yea and by *Fairfax*, 22 E. 4. 19. If the plaintiff were nonsuit at the *nisi prius*, the justices of *nisi prius* should only record it, and remit the record into the king's bench, and not arraign the prisoner at the king's suit.

But the later practice and authority is otherwise, *viz.* That they may not only inquire of the abettors, but also give judgment against them; and, if the plaintiff be nonsuit, may arraign the prisoner at the king's suit, and give judgment and make execution. *Dy.* 120. *a.* *Read's case.* And so if he be convicted of manslaughter upon an appeal. the justices of *nisi prius* allow his clergy, 4 *Co. Rep.* 43. *b.* *Bi-*

(a) cap. 30. See 2 *Co. Inst.* 424.

bith's case; and this it seems is warranted by the construction of the statute of 14 H. 6. cap. 1. for the statute of *Westm. 2. cap. 12. (b)* extends not to this case, especially of arraiging the prisoner upon a nonsuit.

2. As to an indictment of felony or treason removed out of the county by *certiorari*, and the party pleading, the record is sent down by *nisi prius* to be tried, the judges of *nisi prius* may upon that record proceed to trial, and judgment, and execution, as if they were justices of gaol-delivery by virtue of the statute of 14 H. 6. cap. 1.

But if there were any question upon that statute, yet the statute of 6 H. 8. cap. 6. which extends to all justices and commissioners as well as those of gaol-delivery and of the peace, enables the court of king's bench to send to them the very record itself, and by special writ or mandate to command them to proceed to trial and judgment upon such issue joined; as they may command the justices, before whom the indictment was taken, to proceed to hear and determine the same if no such issue were joined.

4 Blacks. Com. ch. 19. p. 269. See Index to 2 Hawk. P. C. Titles *Affise. Nisi prius.*

(b) 2 Co. *Instit.* 383.

Concerning the commission of peace, and the power thereof, in relation to felonies.

AT common law there were conservators of the peace assigned by the king by commission.

But the first establishment of justices of the peace was by the statute of 1 E. 3. cap. 16. *Good and lawful men shall be assigned in every county to keep the peace.*

And by the statute of 18 E. 3. cap. 2. *Two or three of the best reputation in the counties, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and inflict punishment reasonably according to law and reason, and the manner of the deed; and this statute directed their power of hearing and determining as well as keeping the peace.*

In pursuance of these statutes, and of other statutes (a) relative to justices of peace, they have a commission of the peace under the great seal directed to them.

And this commission consisted antiently of three clauses of *Assignavimus*, and now of two.

The first is, *Assignavimus vos coniunctim & divisim & quolibet vestrum ad pacem nostram in com' Cant' conservandam, &c.* And this makes every of them conservators and justices of the peace for those acts that are performable by one justice.

The second is, *Assignavimus vos & quolibet duos vel plures vestrum, quorum aliquem vestrum A. B. C. &c. unum esse volumus, iusticiarios nostros ad inquirendum per sacramentum proborum & legalium hominum de comitatu prædicto, per quas rei veritas melius sciri poterit, de omnibus & omnimodis felonis, veneficiis, incantati-* [43] *onibus, arte magicâ, sortilegiis, transgressibus, forestallariis, regratoriis, ingressariis, extortionibus quibuscunque: Ac de omnibus & singulis aliis malefactis & offensis, de quibus iusticiarii pacis nostræ legitimè inquirere possunt aut debent, per quoscunque & qualitercunque in comitatu prædicto factis & perpetratis, vel quæ in posterum ibidem fieri contigerit; and then goes to some particular offenses, and to inspect indictments taken before them or before former justices of the peace, and to make process against persons indicted, quousque capiuntur, reddant se, vel ulla gentur: Ac omnia & singula felonias &c. & cætera præmissa secundum legem & consuetudinem regni nostri Angliæ audiendum & terminandum, and to do execution thereupon.*

A proviso if a case of difficulty arise, then to respite judgment till the justices of assize come into the county, &c.

So that the commission gives a personal power to every justice of peace by the first clause; but by the second gives to them, or two of them, whereof one of the *quorum*, power to hear and determine felonies, &c.

But besides these powers specially given them by their commission, and the general acts of parliament touching justices of peace, there are divers subsequent statutes, that give them powers, sometimes to one justice, sometimes to two, sometimes in their sessions, sometimes out of their sessions, which it were too long here to recite, I shall only apply myself to that power, that they have by their com-

(a) 34 E. 3. cap. 1. 2 H. 5. c. 1.

mission or otherwise, in relation to treasons, felonies, and capital offences.

1. And in the first place touching the second *Assignavimus*, whereby they have power to hear and determine.

Without this clause they have no power to hear and determine felonies or other matters, for the bare making of them justices of peace without this clause doth not give them power to hear and determine indictments: *vide Stamf. P. C. Lib. II. cap. 5. f. 58. a.* And therefore in all returns of making up of records before justices of peace touching indictments or convictions, they must be mentioend to

[44] be justices of peace, *nec non ad diversa felonias, transgressiones, & alia malefacta in eodem comitatu perpetrata audiendum & terminandum assignat*’.

Yet this clause doth not make them justices of *oyer* and *terminer*, for *that* is a distinct commission of another nature, as hath been shewn; and therefore those acts of parliament, that create new offences and limit them to be heard and determind before justices of *oyer* and *terminer* only, give not thereby power to the justices of peace in such cases, unless also named in the act of parliament.

As the statute of 5 *Eliz. cap. 14.* of forgery, 3 *H. 7. cap. 13.* conspiring the king’s death, 33 *H. 8. cap. 12.* murder in the king’s palace, 8 *H. 6. cap. 12.* embezzeling records, 33 *H. 6. cap. 1.* embezzeling master’s goods, 2 & 3 *E. 6. cap. 24.* stroke in one county and death in another, accessary in one county to a felony in another; for these statutes limit the punishment of these offences to special judges appointed by the acts themselves, or to justices of *oyer* and *terminer*, under which appellation generally, in statutes, justices of peace come not. 9 *Co. Rep. 118. b. Co. P. C. cap. 41. p. 103. Dalt. cap. 20. (b).*

As touching high treason it is not mentioend in their commission, and they have no power to hear and determine it by the general words of their commission.

But a justice of peace upon complaint of a treason, may examine and commit the offender to prison, and take informations touching it, for it is a breach of the peace, and in order to the conservation thereof, he may commit the offender to gaol, in order to farther proceeding against him by justices of *oyer* and *terminer* or gaol-delivery.

But by some acts of parliament justices of peace may take indictments of particular treasons, but those presentments they must certify into the king's bench or gaol-delivery, as the case shall require, as upon the statute of 5 *Eliz. cap. 1.* for maintaining the authority of the see of *Rome*, 13 *Eliz. cap. 2.* for bringing in bulls for absolution, *Agnus Dei*, &c. 23 *Eliz. cap. 1.* for withdrawing and reconciling, or being withdrawn from the king's allegiance.

By the statute of 3 *H. 5. cap. 7.* as to treason for clipping, &c. power was given to the justices of peace to inquire [45] and make process thereupon, and antiently that clause was put into their commission, but now omitted; for by the statute of 1 *Mar. cap. 1.* the act of 3 *H. 5. cap. 6.* is repealed, and consequently the act of 3 *H. 5. cap. 7.* that gave power to justices of peace to inquire touching it.

By the statute of 26 *H. 8. cap. 6.* power is given to justices of peace to the adjacent counties to hear and determine counterfeiting and clipping of coin, and murders and other felonies in *Wales*; but this also as to treasons is repealed by the statute of 1 & 2 *P. & M. cap. 10.*

As touching felonies.

It is true, that by the antient statute of 6 *E. 1. cap. 9.* and 4 *E. 3. cap. 2.* murders and manslaughters were to stay till the gaol-delivery.

But by the statutes of 18 *E. 3. cap. 2.* 34 *E. 3. cap. 1.* 17 *R. 2. cap. 10.* tho they do only mention felonies, and do not expressly mention murders and manslaughters, and although the commission of the peace mentions not murders by express name but only felonies generally, yet by these general words in these statutes, and this commission, they have power to hear and determine murders or manslaughters, and thus it has been resolved 5 *E. 6. Dy. 69. a. Prof.* to 10 *Cz. Rep.* against the opinion of *Fitzherbert* in his Justice of Peace, and 9 *H. 4. 24. Coron. 457.*

For till the statute of 13 *R. 2. cap. 1.* a general pardon of all felonies had pardoned murder; and tho that statute require the word *murder* to be expressed, yet that is with relation only to pardons, and not to restrain the extent of the word *felonies* in a commission.

And therefore I know not what my lord *Coke* means in his comment upon the statute of *Gloucester. cap. 9. 2 Instit. p. 316.* where he saith, *that justices of peace cannot take an indictment of the killing of a*

man *se defendendo*, because not within their commission, but justices of gaol-delivery may; for if justices of peace have a power to hear and determine murder or manslaughter, it seems they may take an indict-

[46] ment of *se defendendo*, for the coroner may take an indictment of *se defendendo*. 3 E. 3. Coron. 286. Co. Entries 354.

a. *Crompt. Justice* 28. a. *Helme's case*, and so may justices of peace against the opinion of *Stamford*, f. 15. b. But tho the justices have this power, yet they do not ordinarily proceed to the hearing and determining of murder or manslaughter, and rarely of other offenses without clergy, and the reasons are,

1. The monition and clause in their commission in cases of difficulty to expect the presence of the justices of assize.

2. The direction of the statute of 1 & 2 P. & M. cap. 13. which directs justices of peace in case of manslaughter and other felonies to take the examination of the prisoner and the information of the fact, and put the same in writing; and then to bail the prisoner, if there be cause, and to certify the same with the bail at the next gaol-delivery; and therefore in cases of great moment they bind over the prosecutors, and bail the party, if bailable, to the next gaol-delivery; but in smaller matters, as petit larceny and some cases within clergy, they bind over to the sessions, *vide Dalt. cap.* 20. (c); but this is but in point of discretion and convenience, not because they have not jurisdiction of the crime.

By force of this commission they may take an inquisition touching *felo de se*, if not inquired before by the coroners; and tho the coroner's inquisition is to be *super visum corporis*, this needs not, but it is traversable. Co. P. C. p. 55.

They may proceed upon an indictment taken before former justices of the peace in the county by the statute of 11 H. 6. cap. 6. and 1 E. 6. cap. 7. but cannot proceed upon an indictment taken before commissioners of oyer and terminer or gaol-delivery. Lamb. Juslic. p. 551.

But if an indictment be taken before the sheriff in his *Turn* by the statute of 1 E. 4. cap. 2. those indictments are to be delivered to the justices of peace at their next session, and they may proceed upon those presentments.

Tho they have power to hear and determine felonies, yet, 1. They cannot deliver a person by proclamation, (as justices of gaol-delivery

may,) till an inquisition taken; but if an inquisition be taken and an *ignoramus* found, they may deliver him, as it seemeth, *Crompt. de Pace, f. 9. b.* 2. They cannot assign a coroner to an approver.

Tho this be not a commission of *oyer and terminer*, yet by the opinion *B. Commission 8.* a commission of *oyer and terminer* in the county determines the second *Assignavimus* of the commission of the peace *ad audiendum & terminandum; quod quære.*

A general commission of the peace in a county, in two cases, doth not determine the power of former justices of peace. 1. Where they are justices by charter, such as are in *London, Norwich, &c.* for these are perpetual and not amoveable. 2. Justices in a particular city or corporation, parcel of a county, by commission are not superseded by a new commission granted for the whole county by the statute of 2 & 3 P. & M. cap. 18. *Vide statute 11 H. 6. cap. 6.*

If the king by charter grant to a corporation, that the mayor and recorder shall be justices of peace within the city, whereby they are justices in perpetuity by charter, yet if there be no words of exclusion, the justices of peace of the county have a concurrent jurisdiction with the justices by charter, and so it is, if they be justices by commission in the town or city: Or the king, notwithstanding that charter, may grant a commission of the peace specially in that city or county, and they will have a concurrent jurisdiction with the justices by charter.

But if this franchise of being justices be granted, *ita quòd justiciarii comitatùs se non intramittant*, then, tho a subsequent commission be granted in the county at large, it seems they have no jurisdiction in this corporation or town. 20 H. 7, 8. *Case de Abbè de St. Albans; quære tamen*, whether the indictment or session in the franchise be void or only a contempt in the justices: This was heretofore moved between the justices of the peace of *Surrey* and the borough of *Southwark*, but never resolved; but some thought it to be like the case of the bailiwick of a liberty and *retorna brevium* granted, *ita quòd vicecomes non intret*, if the sheriff executes a writ within the liberty, the execution is good, but the sheriff punishable for infringing [48] the franchise.

By the statute of 4 E. 3. cap. 2. the justices of the peace ought to deliver all their presentments to the next session of gaol-delivery, where they shall be finally heard and determined.

It is true the justices of peace may so deliver them over, and if they deliver them so over, the justices of gaol-delivery may proceed to determine them, as well as upon the coroner's inquest, namely if the offender be in gaol, but otherwise not.

But this delivery over of the presentments at the session is neither usual nor necessary at this day, for that statute was made when the justices of peace had only power to inquire and not to determine.

But by the statute of 18 E. 3. cap. 2. their commissions where to hear and determine, and so were all the commissions of the peace made after that statute, so that after that statute they might, if they pleased, determine the presentments taken before themselves.

The commissioners of *oyer* and *terminer* may indict and try at the same session, yet (as before) it hath been ruled otherwise in case of justices of peace, unless by consent. But certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony, for here they may and do proceed *de die in diem* and at the same sessions, and so much is intimated in *Bumpfied's case*, H. 11 Car. 1. (d) *supra*, cap. 4. p. 28. and *Coke 4 Instit. cap. 28. p. 164.* expressly saith it is common experience, and reason speaks for it, as well as in the case of the commission of *oyer* and *terminer*, the session being in the same county, and with a public summons preceding every general sessions.

The ordinary course of proceeding is in their sessions, which are of two kinds, *viz.* private sessions, or public. Touching the former I shall say nothing, for it is ordinarily for the dispatch of country business, or about ale houses, poor, &c.

[49] The public sessions are of two kinds, *viz.* the general quarter sessions, and general sessions that are not quarter-sessions; both are or should be summoned by a precept in the king's name; *quod vide Crompt. Justice 232. a.* or of the Justices. *Lamb. Lib. IV. cap. 2.*

As to the jurisdiction in general both agree, that in either of these general sessions of the peace they may proceed touching those matters that are within their commission, as to take indictments, try felons, &c.

But by particular acts of parliament some things are limited to the quarter-sessions, and cannot be proceeded in at other general sessions,

as 5 & 6 E. 6. cap. 14. for ingrossing, 1 H. 7. cap. 7. hunting, 2 & 3 P. & M. cap. 8. highways, 5 Eliz. cap. 9. perjury, 5 Eliz. cap. 12. licensing badgers, 7 E. 6. cap. 5. wines, and divers others, *de quibus vide Lamb. Lib. IV. cap. 19.*

These quarter-sessions were by several acts of parliament appointed to be held at several times, by 25 E. 3. cap. 8. at the *Annunciation*, *St. Margaret*, *St. Michael*, and *St. Nicholas*.

By 36 E. 3. cap. 12. within the *utis* of *Epiphany*, within the week of *Lent*, between *Pentecost* and *Midsummer*, within eight days of *St. Michael*.

By 12 K. 2. cap. 10. the sessions are set at liberty, *viz.* to be held every quarter of the year at least; only *Middlesex* is excepted by 14 H. 6. cap. 4.

By the statute of 2 H. 5. cap. 4. in the first week after *St. Michael*, *Epiphany*, clause of *Easter*, and translation of *St. Thomas* the martyr.

By the statute of 33 H. 8. cap. 10. the *Tuesday* after *Easter* week is expounded to be in the week after *Clausum Paschæ*, for the sessions to be held; yet *Clausum Paschæ* or *Low-Sunday* is the first day of that week.

The strict regular exposition of the statute of 2 H. 5. for the week after *Michaelmas*, &c. is, that if *Michaelmas* fall upon the *Sunday* or *Monday*, the quarter-sessions in strictness should be held in the ensuing week, and not the same week.

Yet it is very plain, that the quarter-sessions are variously held in several counties, some at one day, some at another, [50] yet it hath been ruled, that these are each of them good quarter-sessions within the several acts that relate to quarter-sessions; for these acts, especially that of 2 H. 5. is only directive and in the affirmative, and therefore, tho the sessions are held at another day according to the general direction of the statute of 12 R. 2. yet they are quarter-sessions.

Nay in *Middlesex*, where by the statute of 14 H. 6. there are regularly but two sessions, yet they may hold quarter-sessions (as indeed they do,) in that county: tho these sessions are not precisely held at the times prefixed by 2 H. 5. yet they are quarter-sessions if held quarterly; and so it was agreed by the justices upon a late act (c) this session of parliament for the taking and subscribing the oaths of supremacy.

(c) 25 Car. 2. cap. 2.

II. I shall now proceed to some few observations touching the power of particular justices of peace by virtue of their first *Assignamus* in the commission, which makes every particular justice a justice of peace, and gives him power to conserve the peace.

Concerning their power to bail or commit persons brought before them for felony *vide infra in capite de bail & mainprise (f)*, & *nota statuta*. 34 E. 3. cap. 1. & *alia statuta*.

They are to execute their authority as justices of peace within the county wherein they are justices.

If a justice of peace lives or be out of the county, wherein he is justice, he cannot by his warrant fetch a person out of the county, where he is justice, to come before him in the county, where he is; 13 E. 4. 8. b. *Plowd. Com.* 37. a. *Platt's case*.

He cannot do a judicial act out of the county wherein he is a justice of peace, as take recognizances, take examinations, commit offenders, &c. but he may do a ministerial act, as to examine a party robbed, whether he knows the felons according to the statute of [51] 27 Eliz. cap. 13. H. 6. Car. 1. B. R. *Helier's case*, *Croke*, p. 211, 212. yet *quære* of recognizances and examinations, for they are acts of voluntary jurisdiction, and therefore it seems may be done out of the county, as well as a bishop may grant administration, institution, or orders out of his diocese: But indeed imprisoning of a person for not giving recognizance, or committing a person for a crime, are acts of compulsory jurisdiction, and may not be exercised out of his county (g).

Yet suppose a man be a justice of peace in *London* and in *Middlesex*, as the recorder is, whether he may not commit a person in *Middlesex* brought out of *London* or *à converso*, it seems it hath been always practised, for he is in commission in both places.

If A. commits a felony in the county of B. where he lives, and goes into the county of C. and is there taken, a justice of the peace

(f) cap. 15.

(g) By 9 Geo. 1. cap. 7. §. 3. "If a justice happens to dwell in any city or other precinct, that is a county of itself, situate within the county at large, for which he shall be appointed a justice, tho not within the said county, he may grant warrants, take examinations, and make orders for any matters, which any one justice may act in at his dwelling-house, tho out of the county whereof he is appointed a justice, and in some

"city or precinct adjoining, that is a county of itself; provided, that no power is thereby given to the justices for the county at large to hold their sessions in cities or towns, that are counties of themselves, nor to justices, sheriffs, constables, or other peace-officers of the county at large to act or intermeddle in any matters arising within such cities or towns, otherwise than as if the said act had never been made."

of the county of *C.* may take his examination and informations in the county of *C.* tho the felony were committed in the county of *B.* yet *quære*, whether upon his arraignment in the county of *B.* those examinations can be given in evidence; I have not allowd them, because tho he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence or commit them, yet that is but for necessity of preserving the peace, for he hath really no jurisdiction in the case.

And *note*, the custom of *London* enables the justices of gaol-delivery to sit at *Newgate*, which is in *London*, both for *Middlesex* and *London*, but the justices of the peace for *Middlesex* sit only in *Middlesex*, and the justices of the peace for *London* in *London*.

By the statute of 1 & 2 *Ph. & Mar. cap. 13.* they ought to take the examinations of felons (without oath,) and the [52] informations of accusers or witnesses (upon oath,) and return them to the justices of gaol-delivery.

And these examinations may be read as evidence against the prisoner, and so may the informations of witnesses taken upon oath, if they are dead or not able to travel, for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or his clerk, that these examinations and informations were truly taken.

If *A.* brings *B.* before a justice of peace for suspicion of felony, if he can testify materially against him, he may bind him over to prosecute; and, if he refuses, the justice may commit him.

The justices of the peace have jurisdiction of felonies arising within the verge. 4 *Co. Rep.* 46. *a. Wigg's case.*

The justices of the peace in their sessions may proceed to outlawry in cases of indictment found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 *Jac. cap. 4.*

But they cannot issue a *capias utlegatum*, but must return the record of the outlawry into the king's bench, and there process of *capias utlegatum* shall issue. *Dalt. p. 406. (h).*

See Burn. Tit. Justices of Peace. 1 Blackf. Com. ch. 9, p. 351, &c. and Index to
2 Hawk. P. C. Tit. Peace.

(b) *New Edit. p. 672.*

C H A P. VIII.

Concerning the coroner and his court, and his authority in pleas of the crown.

CORONERS are of three kinds, viz. 1. *Virtute officii*. 2. *Virtute cartæ five commissionis*. 3. *Virtute electionis*, as the coroners of counties.

I. The coroner *virtute officii* is the chief justice of the king's bench, who by virtue of his office is the chief coroner of *England*, 4 *Co. Rep.* 57. *b. in case de comminallie de Sadlers*, and therefore it is there said, "That in the time of *H. 7.* it was resolved, if a man be slain in open rebellion, the chief justice upon the view of his body may make a record thereof and send it into the king's bench, and thereupon the party slain shall forfeit his lands and goods," which may be true as to goods, but not as to lands, because none can be attainted after his death but by act of parliament.

But of this hereafter.

II. Coroners by charter or commission or privilege: And these ordinarily were made by grant or commission without election; such are the coroners of particular lords of liberties and franchises, who by charter have power to create their own coroners, or to be coroners themselves: Thus the mayor of *London* is by charter coroner of *London*, the bishop of *Ely* hath power to make coroners in the isle of *Ely* by the charter of *H. 7.* Queen *Catharine* had the hundred of *Colridge* granted to her by the king 35 *H. 8.* with power to nominate coroners. 9 *Co. Rep.* 29. *b. Ameredith's case*.

And therefore by the statute of 28 *E. 3. cap. 6.* where the power of electing coroners is confirmed to the counties, yet there is a saving to the king and other lords, which ought to make such coroners, their feignories and franchises, so that the king may grant coroners [54] within certain precincts; and lords of franchises, that have power to nominate coroners by charter, may still do it without election.

There have been two great precincts, that by the king's grants have power of granting or having coroners, namely, the jurisdiction of the admiralty, and the verge.

As

As touching the former I have not seen the grant, but I have heard the lord admiral is either made coroner, or hath power to make them within his jurisdiction; and of the death of a man or other articles belonging to the coroner arising upon the high sea, inquisitions have been usually taken by the coroners appointed by the king or his admiral, and here the coroners of the county have no jurisdiction.

But of deaths of men happening upon arms of the sea below the bridges within the bodies of counties, as upon *Thames* or *Severn*, &c. in ships there hovering, tho the coroner of the admiralty hath jurisdiction, yet it is not exclusive of the jurisdiction of the coroner of the county, who may inquire in any great river upon these articles, where a man can see from one side to the other, 8 *E. 2 Coron.* 399. Only the inquisitions taken before the coroner of the admiral are returned before the commissioners upon the statute 28 *H. 8. cap.* 15. The inquisition before the coroner of the county is to be returned before the commissioners of gaol-delivery for the county.

The other great jurisdiction is the coroner of the king's house, usually called the coroner of the verge, who it seems anciently was appointed by the king's letters patent; but by the statute of 33 *H. 8. cap.* 12. the granting thereof is settled in perpetuity in the lord steward, or lord great master of the king's house for the time being.

Anciently the coroner of the verge had power to do all things within the verge belonging to the office of the coroner, exclusive of the coroner of the county; but because the king's court was moveable often, by the statute of *Articuli super cartas, cap.* 3. (a), it is ordained, that of the death of a man the coroner of the county shall join in inquisition to be taken thereof with the coroner of the king's house; and if it happen it cannot be determined before the steward, [55] process and proceeding shall be thereupon had at common law.

But yet in that case of death within the verge, the coroner of the county cannot take an inquisition without the coroner of the verge; and if he doth, it is void; but if one person be coroner of the county and also of the verge, the inquisition before him is as good as if the offices had been in several persons, and taken by both.

And tho the court remove, yet he may proceed upon that inquisition, as coroner of the county. 4 *Co. Rep.* 45 & 46 *Wigg's case.*

But if a murder or manslaughter be done within the precincts of the king's palace limited by the statute of 33 *H. 8. cap.* 12, then by that

(a) 2 *Co. Instit.* p. 550.

statute the inquisition shall be taken by the coroner of the household, without the adjoining or assisting of any coroner of any county, by twelve or more of the yeomen officers of the king's household; and this is enacted to be as sufficient, as if taken also by the coroner of the county, and the method of the return and proceeding upon those inquisitions before the lord steward is therein declared and enacted.

III. The general coroners of counties.

These by the statute of *West.* 1. *cap.* 10. (*b*), and 28 *E.* 3. *cap.* 6. are eligible by the county in the county-court by the king's writ *de coronatore eligendo*, and sworn by the sheriff for the due execution of their office. *F. N. B.* 163.

The statute of *Westm.* 1. directs they should be knights, but that is out of use; but by the statute of 14 *E.* 3. *cap.* 8. they ought to have sufficient lands in the county; and by the statute 28 *E.* 3. *cap.* 6 they ought to be lawful and fit men.

In as much as their office is by election, their offices do not determine by the demise of the king, as sheriffs do. *Dy.* 165. *a.* (*)

And in as much as they are elected by the freeholders of the county, if they be insufficient and not able to answer their fines, and [56] perform the duties of their place, the whole county shall be answerable for them and their miscarriages, and amercements or fines shall be imposed upon them for the same, (*viz.* if upon process against the coroner for his fine or amercement the sheriff return *nihil habet*,) and process shall go against the whole county, because elected by them. 2 *Co. Instit.* p. 175.

In some counties there be only two coroners, in some four, in some six, and by the statute of 34 & 35 *H.* 8. *cap.* 26. in each county in *Wales*, and in *Chester* two.

If there be above two coroners in a county, and a writ be directed *coronatoribus*, tho one die, yet as long as the plural number remain, a return by the coroners is good; but if there be but only one survivor, he cannot execute the writ and return it till another be made. 14 *H.* 4. 35. *a.* 31 *Affix.* 20. But if there be two coroners, in a county or more, one may execute the writ, as in case of an *exigent*, but the return must be in the name of the *coronatores*. 14 *H.* 4. 34. *b.* *per Hank.* 39 *H.* 6. 41.

But tho there be many coroners in the county, an inquisition *super visum corporis* may be taken by any one of them. *Stamf. P. C.* p. 53. *a.*

(*b*) 2 *Co. Instit.* p. 174.

(*) See 4. *E.* 4. 43. *a.* in *notis ad p.* 101.

As coroners may be elected by writ *de coronatore eligendo*, so they may be amoved for reasonable cause, and new ones chosen in their room by writ.

And altho that cause be not traversable, 5 Co. Rep. 58. b. yet if it be false, he may have a *superseate* to that new writ. F. N. B. p. 103.

Thus far concerning the constitution of these officers and their different kinds; now touching their jurisdiction and proceeding.

Before the statute of *Magna Carta*, cap. 17. (c) the coroner held pleas of the crown, by that statute *nullus vice-comes, constabularius, coronator vel alii ballivi nostri teneant placita coronæ*, so that thereby their power in proceeding to trial or judgment in pleas of the crown is taken away.

But yet they retained a jurisdiction still as to matters of inquiry, taking of appeals, &c. all which is set down at large [57] in the statute of 4 E. 1. styled *De officio coronatorum*, viz. 1. Of the death of a man, whether by felony, misfortune, &c. viz. *de subito mortuis*. 2. Of *treasure-trove*. 3. Of appeals of rape. 4. Appeals *de plagis & mahemio*. 5. Of deodands. 6. Of wreck of the sea; and 7. By some, of breach of prison (d). I shall reduce them to these four, viz.

1. His power to take inquisitions *super visum corporis*. 2. His power to take appeals. 3. His power to take the accusation of an approver. 4. His power to take abjuration.

I. For inquisitions.

Regularly the coroner hath no power to take inquisitions, but touching the death of a man and persons *subito mortuis*, and some special incidents thereunto.

If any person dies suddenly, tho it be of a fever, and the township bury him before the coroner be sent for, the whole township shall be amerced. *Itin. North. Coron.* 319. *Nota*, this case is misprinted, I have seen an ancient transcript at large of the *Iter of North'm.* and perused this very case, which in *libro meo f. 52. b.* is *no ust de pyme*, viz. starved by hunger; for tho a man dies suddenly of a fever or apoplexy, or other visitation of God, the township shall not be amerced, for then the coroner should be sent for in every case; but if it be an unnatural or violent death, then indeed if the coroner be not sent for to view the body, the town shall be amerced.

(c) 2 Co. Instit. p. 32.

(d) Vide Coron. p. 435.

And so it is if the vill leaves a body, that died of a violent death, above ground unburied, the township shall be amerced, 3 E. 3. *Coron.* 339. and the amercements in these cases may be set upon the presentment of the grand inquest, or upon the presentment of the coroner.

But if a prisoner *in gaol* dies a natural death, yet regularly the gaoler ought to send for the coroner to inquire, because it may be possibly presumed, that the prisoner died by the ill usage of the gaoler.

[58] And if this death happens in the king's bench, the clerk of the crown, who is the coroner for that court, is to view the body. 3 E. 3. *Coron.* 292. 8 E. 2. *Coron.* 421.

If the coroner have notice and comes not in convenient time to view the body and take his inquisition upon the death of him, that thus dies suddenly, and therefore upon a presentment by the grand inquest of a death by misadventure, if the like presentment be not found in the coroner's roll, he shall be fined and imprisoned. 3 E. 3. *Coron.* 292.

And by the statute of 1 H. 8. *cap.* 7. he shall forfeit forty shillings for every such default, and the justices of the peace and justices of assize have power to enquire of those defaults, and this without any fee to be taken by the coroner. But by the statute of 3 H. 7. *cap.* 1. if the coroner be remiss, and makes not inquisitions upon persons slain, or doth not return the same to the next gaol-delivery, he is to forfeit 5l. for every default.

The coroner cannot take an inquisition but upon the view of the body, and if he doth, such inquisition is void; and the reason is, because oftentimes much of the evidence ariseth upon the view, for the inquisition ought to contain the manner of his death, the place, length and depth of the wound, &c.

And therefore tho where there are many coroners, one may take the inquisition. *Star. f.* 53. a, yet it cannot be done by deputy, for by the statute of *Exon* 14 E. 1. the coroner is to view the body and take the inquisition in his own person. *Crompt. Justice, f.* 227. a.

And therefore if the body be buried before the coroner comes, tho the coroner ought to record it, and the township shall be thereupon amerced, as before is said, yet the coroner ought to take up the body, and take his view thereof, if there be any possibility of it, and therefore the body hath in such case been taken up fourteen days after,
and

and an inquisition thereupon taken. 2 R. 3. 2. a. 21 E. 4. 70, 71. *Wingfield's case*.

And therefore if the coroner take an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisition is good for the first was ab- [59]
solutely void. 2 R. 3. 2. 21 E. 4. 70.

But if a coroner takes an inquisition *super visum corporis*, and after this another coroner takes an inquisition upon the same matter, the second inquisition is void, because the first was well taken. M. 6 R. 2. *Coron.* 107. *Crompt. Justic.* 229. b.

If a coroner takes an inquisition *super visum corporis* (as upon a *felo de se*), and that is sent into the king's bench and quashed, the coroner may take a new inquisition *super visum corporis*.

But upon a surmise, that the coroner ought to have found him *felo de se* and hath not, there shall be no *melius inquirendum* directed to the sheriff; I have known it often denied, and it was held it was within the restraint of the statute 28 E. 3. cap. 9.

But possibly a commission or writ may issue for the inquiry of the goods of a felon not mentioned in the coroner's inquisition.

If the coroner do not inquire of a *felo de se*, or of any other sudden death, the justices of the peace or *oyer and terminer* may enquire thereof, and so may the justices of the king's bench, but then that presentment is traversable; but it is held that the presentment of the coroner of a *felo de se* is not traversable, *de quo supra*, Part I. cap. 31. p. 414. *Co. P. C.* cap. 8. p. 55.

When notice is given to the coroner of a misadventure, he is to issue a precept to the constable of the four or six next townships to return a competent number of good and lawful men of their townships, *viz.* twelve at least to make an inquisition touching that matter. 4 E. 1. *Officium coronatoris*.

If they make not a return, or the jurors returned appear not, their defaults are to be returned by the coroner, and the constables or jurors in default shall be amerced before the justices in *eyre* antiently, but now before the justices of gaol-delivery.

But if the jurors appear, by *Crompt. Justice*, f. 226. b. they are not challengeable by either party.

Yet in *Mich. 4 Car. B. R.* Sir William Withipole's case [60]
by the greater opinion of all the judges of England the statute of 11 H. 2. cap. 9. extends to inquisitions before the coroner, and

that if in an inquest before the coroner one of the jurors be outl awed tho but of trespass, this is a good plea to a coroner's inquest of murder *Co. p.* 134.

The jury is to be sworn and charged to inquire upon the view of the body how the party came by his death, whether by murder by any person, or by misfortune, or as *felo de se*.

In such cases, where the coroner's inquest is conclusive, (as it is commonly held in the case of *felo de se*,) the coroner must hear evidence as well against the king's interest as for it, and that upon oath, for there is no person to be condemned to death, but only the fact to be inquired into.

And so it was ruled in *Barclai's* case who drowned himself, and the coroner would not admit witnesses to prove him to be *non compos mentis* at the time, but shut them out, and only took witnesses for the king; and for this cause the coroner was reprehended by the court of king's bench, and the inquisition set aside and not suffered to be filed, and a new inquisition taken, whereby it was found he was *non compos*, for in this case there was no person put to answer; *de hoc vide supra, Part I. p.* 415.

But it hath been held, that if a person be killed by another person, and it be certainly known that he killed him, the jury must hear evidence only for the king; and whether the killing were by malice or without malice, nay tho it were such a killing as is justifiable, as an officer killing one that assaults him in doing his office, yet the inquest must find it murder, because the party shall be put to answer, and upon not guilty pleaded the whole matter will come to be tried by the petit jury, where the evidence of both sides may be openly heard in court, and such direction given as the nature of the fact requires, *viz.* to be murder, manslaughter, or *per infortunium*: and thus it hath been commonly practised of later years.

But it seemeth to me, that this is neither reasonable nor agreeable to law or antient usage, but is a novelty as to the case of [61] the coroner's inquest, tho it may be and is reasonable and fit in case of an indictment by the grand inquest of the county, for these reasons: 1. Because the coroner's inquest, is to inquire *truly* (*e*) *quomodo ad mortem devenit*, and is rather for information of the

(e) Why should not this argument hold as well in the case of an indictment by the grand inquest, since they are likewise by

their oath to present the truth, the whole truth, and nothing but the truth? *vide infra, p.* 157.

truth of the fact as near as the jury can assert it, and not for an accusation. 2. Because tho the prisoner may be arraigned upon the coroner's inquest, if it find it murder or manslaughter, yet neither the court nor the prosecutor is concluded by it, but a bill of murder may be preferred to the grand inquest; and upon that new presentment the party may be arraigned and tried, tho the coroner's inquest arises only to manslaughter, or it may be to *se defendendo* or chance-medley. 3. And accordingly the antient practice hath been, for the coroner's inquest to find the matter as they judge it was: *vide 28 Eliz. Crompt. Justice, f. 28. a. Holmes's case, Coke's Entries 313. b.* and very often in the antient *Iters of E. 2. and E. 3. de quo supra.*

And therefore the difference of the penning of the act of 1 & 2 P. & M. cap. 13. touching the examinations taken by the justices of the peace and the coroner is observable: The justices of the peace are to put into writing the informations against the felon of the fact and circumstances thereof, or *so much thereof as shall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without saying *so much as is material to prove the felony*, but the whole evidence given whether to prove or disprove the felony; and all this evidence is to be upon oath before the coroner's inquest, whether it makes for or against the prisoner: but indeed when the prisoner is to be tried upon that indictment, or the indictment of the grand inquest, those witnesses, that acquit the prisoner, are not to be heard upon oath at his trial, unless the prosecutor desires it (*f*).

So that I do conceive the coroner's inquest ought in all cases to hear the evidence upon oath, as well that which [62] maketh for, as that which maketh against the prisoner, and the whole evidence ought to be returned with the inquisition.

Now sudden violent deaths, which are all within the coroner's office to inquire, are of these kinds. 1. *Ex visitatione Dei.* 2. *Per infortunium*, where no other had a hand in it, as if a man falls from a house or cart. 3. By his own hand, as *felix de se.* 4. By the hand of another man, where the offender is not known. 5. By the hand of another, where he is known, whether by murder, manslaughter, *se defendendo*, or *per infortunium*.

(f) This was indeed the practice, tho unsupported by any authority in law, but now by 1 Ann. cap. 9. the witnesses on

the behalf of the prisoner in all trials for treason or felony are to give evidence upon oath.

1. If the inquest find that he died *ex visitatione Dei*, there is no more to be done, only the inquisition, together with the examinations, are to be returned to the next gaol-delivery, by the statute of 3 H. 7. cap. 1.

2. If the inquest find the death *per infortunium* simply, as by a fall &c. then the coroner is to take the examination, and return the same with the inquisition to the next gaol-delivery, and to inquire of the deodand, and the value, and in whose hands, and to seize and deliver the same to the township to be answerable for the same to the king, by the statute of 4 E. 1. *De officio coronatoris*.

But if the person were drowned in a pit, the coroner shall command the vill to stop it, and if it be not done, the vill shall be amerced in *eyre*, or before justices of gaol-delivery. 8 E. 2. *Coron.* 416.

And *note*, that in no case the coroner sets any fine or amercement as for non-appearance of juries or constables, escapes of townships, &c. but only presents it to the next justices in *eyre*, or now to the next gaol-delivery, and they impose the fine.

3. If the inquest find a man *feo de se*, they ought to find the special matter, and also what goods and chattels he had, of what value, and seize and deliver the same to the township to be answerable to the king or his almoner, or the lord of the franchise, to whom they belong, and shall bind over the first finder of the body to the next gaol-delivery.

[63] 4. If the party be slain and the felon is not known, they are to find their inquisition accordingly, and shall bind over the first finder of the body to the next gaol-delivery, and return his examinations, together with his inquisition, by the statute of 1 & 2 P. & M. cap. 13.

And *note*, that the antient manner of inquiry in this case, whether by the coroner or justices in *eyre*, was, 1. *Quis primus inventor?* 2. *An malè creditur?* If so, then if he were present, he might be arraigned; if absent, they went on to the outlawry against him; but if they answered, *non malè creditur*, then he was discharged. 35 H. 6. 15. a. B. *Conspiracy* 4.

5. But if the person was slain, and the party that did it was known, and the inquisition found him guilty of the death, or that he died by his hand, there were these proceedings, namely,

The inquest were also to inquire of all that were present, aiding and abetting.

They

They shall also inquire of all accessaries *before* the fact, but they cannot inquire of accessaries *after* (*), and therefore a presentment of a *fugam fecit* upon an accessary *after* is void. *Stamf. P. C.* 183, 184. 4 *H.* 7. 18. *b.*

If they find a man guilty as principal or as accessary *before*, they are also to inquire whether he fled for the same; for if the party be acquitted upon his trial, nay tho the petit jury upon his trial find him not guilty, nor that he fled, yet this inquisition before the coroner shall cause a forfeiture of his goods, for it is not traversable. *Dy.* 238. *b.* *Stamf. P. C.* p. 183. *b.* (†).

If a party be found guilty by the coroner's inquest, or that he fled, they are also to inquire of his goods and chattels; and by the antient law the coroner was presently thereupon to seize and inventory his goods, and delivery them to the *villata* to be answerable to the king for them, as appears by the statute of 4 *E.* 1. how far this is altered by the statute of 1 *R.* 3. cap. 3. *vide quæ supra*, Part I. cap. 27. p. 365.

But it seems, that if there be a presentment before the coroner of a *fugam fecit*, the statute of 1 *R.* 3. takes no place as to that, because, whether convicted or acquitted, the *fugam fecit* stands as [64] an unavoidable forfeiture, and therefore the coroner may without question seize the goods so found by inquisition upon a *fugam fecit*, and commit them to the township.

If the persons, that are found guilty by the inquest, be taken, the coroner may and must commit them to the sheriff, and he is to send them to the gaol by the statute of 4 *E.* 1. But if any were present and found not guilty, the coroner was to bind them over to the next gaol-delivery by the same statute, and to record their names in his roll: This was to the intent, that if farther evidence was discovered against them, they might be there proceeded against, if not, then they might be used as witnesses; but the statute of 1 & 2 *P. & M.* cap. 13. hath made better provision; *de quo infra*.

If the parties found guilty as principals or accessaries *before* by the coroner's inquest be not to be found, the coroner might proceed to the outlawry against them at common law, *quod vide* 27 *Affiz.* 47. viz. by process of *capias* to the sheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed: *vide Crompt. Justice*, p. 226. *b.*

(*) *Vide* Part I. p. 416. *in notis*.

(†) *Vide* Part I. p. 363 & p. 417.

But now that course is altered, and the coroner ought not to proceed to the outlawry, but is to return his inquisition to the next gaol-delivery by the statute of 3 *H. 7. cap. 1.* and the justices of gaol-delivery are to proceed against the offenders, if in gaol; and if not in gaol, then to certify the inquisition into the king's bench, and there process of outlawry to go against them upon that inquisition.

And by the statute of 1 & 2 *P. & M. cap. 13.* the coroner is to take the examinations against the principals and accessaries *before*, and put them in writing, and bind over witnesses by recognizance to the next gaol-delivery, and then to return their examinations, recognizances, and inquisitions upon pain of 40*s.* for every default.

In case of an indictment of murder or manslaughter by the grand inquest, if the prisoner appears, pleads, and be acquitted by the petit jury, they say so and no more, only they inquire of the flight.

[65] But if a person be found guilty by the coroner's inquest, and plead and be acquitted, yet in as much as the coroner's inquest have found that he was kild, the court gives credit to it, and therefore the petit jury must also give in, who it was that kild him, which serves as an indictment against that other person. 13 *E. 4. 3. b.* 14 *H. 7. 2. b.* and commonly if they cannot tell, they give in some fictitious name as *John a-Noke*, which serves the turn.

If there be an inquisition of manslaughter or murder, and also an indictment by the grand inquest of the same offense, and he is arraigned and found not guilty upon the indictment by the grand inquest, yet it is necessary to quash the other inquisition or arraign the party upon it, and he is to plead *autrefois acquit*, or *not guilty*, and so be acquit upon that also, for it otherwise stands as a record against him, upon which he may possibly be outlawed.

But if both indictments be of the same nature and for the same offense and be good, he may be arraigned and tried upon both at once.

By the statute of *Wesim. 1. cap. 10.* the coroner was to take nothing for the execution of his office touching the death of a man.

But by the statute of 3 *H. 7. cap. 1.* in cases of murder or manslaughter he was to have the fee of 13*s. 4d.* out of the goods of the felon, or out of the amercement set upon the township for an escape.

But by the statute of 1 *H. 8. cap. 7.* for an inquisition upon the death of a man by simple misfortune or misadventure, he is to take nothing upon pain of forfeiting forty shillings.

1. By what hath been before said it appears, that the coroner hath power to take an inquisition of felony of the death of a man, and likewise of certain incidents thereunto. 1. Of accessaries before the fact, but not of accessaries after. 2. Of the escape of the manslayer, that thereupon the township may be amerced, which is farther confirmed by the statute of 3 *H. 7. cap. 1.* 3. Of his flight. 4. Of his goods and chattels: But he hath no power to take an inquisition of any other felony, tho in some cases he hath power to take appeals of other matters, as shall be said hereafter. 2 *Co.* [66] *Instit. p. 32.* Only by custom in *Northumberland* the coroner hath power to inquire of other felonies. 35 *H. 6. 27. b.*

But it is said that he may take the confession of him, that breaks prison, and upon his record thereof the party shall be hanged. 8 *E. 2. Coron. 435.*

2. But altho he hath power to take an inquisition touching the death of a man, it must be *super visum corporis*, and not otherwise.

And therefore in antient times if a man were hurt in the county of *A.* and died in the county of *B.* the coroner of the county of *B.* could not take an inquisition of his death, because the stroke was not given in that county, nor could the coroner of the county of *A.* take an inquisition, because the body was in the county of *B.* but they used to remove the body into the county of *A.* and there the coroner of that county to take the inquisition. 6 *H. 7. 10. a.*

But this would not avail, till the statute of 2 & 3 *E. 6. cap. 24.* gave a remedy in this case by indicting and trying him in the county where he died.

But if he were stricken and had also died in the county of *A.* and the body had by some means been after removed into another county, he ought to be removed into the county of *A.* where he was stricken and died.

3. That altho he might take an indictment of death, and at common law proceed to outlawry, yet by the statute of *Magna Carta, cap. 17.* he was disabled to hear or determine *that* felony, or to make execution upon the outlawry.

4. But tho the coroner could not take any inquisition but *super visum corporis*, yet in some cases, that were not felony, he might take an inquisition; as 1. *De Thesauro invento.* 2. Of wreck and royal fish. 3. And it seems he had a power to attach a person, that had dan-

dangerously wounded another, and that not only upon an appeal of mayhem, but also *ex officio*, as a thing tending to danger of death; *quod vide* 4 E. 1. *De officio coronatoris*.

[67] And thus far touching inquisitions before the coroner. II. The second thing, wherein the coroner's power lies, is taking of appeals, namely appeals of murder, appeals of robbery, appeals of rape, appeals *de plagis & mahemio*; and this appears by the statute of 4 E. 1. *De coronatoribus*.

These appeals can be taken only of facts done within the county, whereof he is coroner. *Stamf. P. C. f. 63 a. (g)*.

This appeal is to be by bill in proper person, and before the coroner and sheriff: *vide stat. 34 H. 7. cap. 1*.

But yet the coroner is the principal judge, and therefore a *certiorari* to remove such a bill may be to the coroner alone. 4 H. 6. 16. a. Dy. 222. b. or to the coroner and sheriff, because by the statute of *Westm. 1. cap. 10*. the sheriff hath a counter-roll. 38 E. 3. 14. b. *Register* 284. a. Dy. 223. a. But not to the sheriff alone neither for appeals nor outlawries, unless in *London*. Dy. 317. a.

Altho by the statute of *Magna Charta, cap. 17*. the coroner cannot determine the appeal, yet he may do these things. 1. He may record the nonsuit of the plaintiff in an appeal by bill before him, 22 *Affiz.* 93. 2. He may award a *capias* and *aliàs* to the sheriff, and may thereupon demand the defendant at five counties, and outlaw the defendant, 22 *Affiz.* 97. tho *Stamford* makes a doubt of it, *Lib. II. cap. 14. f. 64. a.* and thinks that the appeal must be removed by *certiorari* into the king's bench, and there only process of outlawry can issue; but when the appeal is sued before the coroner and sheriff, to have the appeal determined it must be removed into the king's bench by *certiorari*.

III. The third power of the coroner is to take the accusation of an approver, namely when a person is indicted before justices of gaol-delivery or in the king's bench for any felony, he may confess the offense, and impeach or accuse or appeal others of felony, and thereupon the court assigns him a coroner to take his confession.

The coroner upon an appeal by an approver may take an appeal of the approver against any person for any felony or treason [68] committed in the same county, or in any other county. 19 E. 3. 42. *Coron.* 462.

If the appeal be in the same county, it seems the coroner may make a precept to the sheriff to take the person appeal'd; but if he be only a coroner of a franchise, it seems he may make a precept to the sheriff to attach him, *quære*; but howsoever he cannot make a precept to the bailiff of the franchise, because the bailiff of a franchise cannot execute a process within his franchise, but by the precept of the sheriff. 29 E. 3. 42. *Coron.* 462.

And therefore it seems in that case he must return the appeal before the judge of gaol-delivery within the franchise, and he may make process within the franchise to the sheriff; *vide* the case of *Ely*, 29 E. 3. 41. *b. quære*, how the usage is there, *viz.* whether the judge makes process out of the liberty, and to whom.

But if the appeal be of a felony or treason out of the county, the same must be removed or certified to the justices of gaol-delivery, and they may make process into any county of *England* to take the person appeal'd; and so the case of an appeal by an approver differs from the appeal by a person grieved. 5 H. 5. *Coron.* 437. 29 E. 3. 42. *Coron.* 462. *Stamf. P. C. Lib. 1. cap. 52. f. 53.*

IV. The fourth power of the coroner is to take the confession of a felony by a felon, tho the felony were committed in any foreign country, and to take his abjuration. *Stamf. f. 53.*

But by the statute of 1 Jac. cap. 25. continued by 21 Jac. cap. 28. the whole business of sanctuary, and the abjuration before the coroner relative to sanctuary, is taken away; and therefore it is needless to repeat the office or power of the coroner in relation to sanctuary *Co. P. C. cap. 51.*

See 1 Blackf. Com. ch. 9. pa. 346. 4 Blackf. Com. ch. 19. pa. 274. ch. 21. p. 292. Index to 2 Hawk. p. C. Tit. Coroner and Burn. Tit. Coroner.

CHAP. IX.

[69]

Concerning the sheriff, his power in pleas of the crown, as well by commission, as in his Turns.

THE power of the sheriff to hold pleas of the crown, as well as the coroners and other the king's bailiffs, is restrained and taken away by *Magna Charta*, cap. 17. recited in the former chapter.

Yet

Yet after that statute he had power to receive indictments and presentments of felony, tho he had not power to determine them.

And this power was of two kinds, *viz.* special by virtue of a special writ or commission, and general or *virtute officii* in his *Turn*.

The former of these powers, *virtute brevis* or *commissionis*, continued in use till the statute of 28 E. 3. *cap.* 9. and by that statute all former commissions and writs of that nature are repealed; and enacted, that for the future no such commission or commissions shall be granted.

And therefore H. 37 Eliz. B. R. where the coroner found a death *per infortunium*, and it was surmised for the king, that he was *felo de se*, and a *melius inquirendum* prayed to the sheriff; ruled that none should issue, because contrary to the statute.

The latter power of the sheriff is *virtute officii*, and this still continues in the sheriff, namely, that he hath power in his *Turn* to take inquisitions of felonies, that were felonies at common law; but the sheriff cannot take any inquisition of any felony created by act of parliament, unless the same act likewise gives him jurisdiction; and therefore the sheriff in his *Turn* cannot take an inquisition of rape.

[70] This court is a court of record, and the sheriff or his steward or clerk is judge in it, the style *Placita coram vicecomite com' S. in Turno*.

The indictments taken here have these requisites.

1. That the courts be held *infra mensem Paschæ, & mensem Michaelis* by the statute of 31 E. 3. *cap.* 15. or else they lose their turn for that time, which hath been expounded their court so held for that turn only shall be void. *Stamf. P. C. f. 84. b. 6 H. 7. 2. a. 38 H. 6. 7. a.*

2. The indictment must be under the seals of the indictors, and by twelve jurors at least by the statute of *Westm. 2. cap. 13. (a)*. And by the statute of 1 E. 3. *cap. 17.* it must be by rolls indented between the sheriff and the indictors, (which last statute extends also to leets and franchises,) otherwise the indictments are void; and one of the indictors must shew one part of the indenture to the justices, when they come to make deliverance.

3. By the statute of 1 R. 3. *cap. 4.* the indictors in the sheriff's *Turn* must have 20*s.* freehold, or 26*s.* 8*d.* copyhold, and be of good name, otherwise the sheriff or bailiff shall forfeit 40*s.* and the indictment is void.

And therefore, if any be arraigned of felony upon such an indictment, he may plead that one of the indictors had not 20s. freehold, nor 26s. 8d. copyhold; so that when it is said *it shall be void*, it must be intended void by plea; for if the prisoner excepts not to it upon his arraignment, he is concluded by that omission.

Upon these indictments of felonies in the sheriff's *Turn*, tho they could not proceed to hear and determine them by reason of the statute of *Magna Charta*, cap. 17. yet the sheriff did commonly make out process or precepts in nature of *capias* to arrest the parties, as appears by the statute of *Wilm.* 2. cap. 13.

But now by the statute of 1 E. 4. cap. 2. their power of making out process upon these indictments is taken away, as well in case of indictments of felony, as other misdemeanors within their cognizance; but they are to deliver all such presentments and indictments to the justices of the peace at their next sessions, who are [71] to make out process thereupon, and hear and determine them; but if the original presentment were not within the jurisdiction of the *Turn*, the justices of peace ought not to proceed upon such indictments, tho removed before them. 4 E. 4. 31. a. 8 E. 4. 5. b.

And what hath been said touching the *Turns* of sheriffs is in a great measure applicable to leets, namely they have power to receive indictments of felonies at common law, but not of felonies by act of parliament, unless specially limited to them.

The statutes of *Magna Charta*, cap. 17. 1 E. 3. cap. 17. extend to them as well as to *Turns*, but not the statute of 1 E. 4. and therefore they cannot hear and determine felonies presented in them, but must send their indictments of felonies to the justices of gaol-delivery there to be heard and determined, if the offenders are in custody, 8 H. 4. 18. a. *Franchise* 2. or remove by *certiorari* into the king's bench, that process may be made upon them to an outlawry.

And thus far concerning the ordinary jurisdiction, wherein felonies are inquired of, heard or determined; I have wholly omitted the courts in *eye*, the courts of the *staple*, and the franchise of *infangthief* and *unfangthief*, because they are wholly disused, and the learning concerning them rather for curiosity and antiquity, than for use in this business of pleas of the crown. The jurisdiction also of the royal franchises of *Ely*, *Hexham* and *Hexhamshire*, and other particular franchises remaining excepted by the statute of 27 H. 8.

cap.

cap. 24. are but particular jurisdictions, and not so useful for the pleas of the crown, as for a tract concerning the jurisdiction of courts.

And thus far touching the ordinary jurisdictions in cases capital.

See 1 Blackf. Com. ch. Introd. p. 116. ch. 9. 339. 4 Blackf. Com. ch. 21. pa. 292. ch. 33. p. 413. 428. ch. 19. p. 273. and Burn. Tit. Sheriff. per tot. and Index to 2 Hawk. P. C. Tit. Sheriff. Tit. Turn.

[72]

C H A P. X.

Concerning the apprehending or arresting of felons and traitors by private persons, and escapes.

HAVING in the foregoing chapters considered the several courts of ordinary jurisdiction, where traitors and felons are to be proceeded against, I shall now descend to the consideration of the means and method of bringing such offenders to trial, judgment, and execution.

And herein I shall observe this order, first to consider those courses, that are preliminary to their arraignment, and afterwards to consider of their arraignment, and those proceedings, that are subsequent thereunto, their trial, judgment, and execution.

Concerning the former, namely the courses preliminary to their arraignment, they are principally these, *viz.* 1. The arrest or apprehending of them. 2. Their imprisonment or commitment, and therein of bailing or discharging them before indictment. 3. Their indictment.

Touching the first of these, namely their arrests or apprehending them.

This is the first instance of their prosecution, and this is done either, 1. By private persons by virtue of the law, or 2. By officers or *virtute officii*, or 3. Upon hue and cry levied, or 4. By warrant or precept *virtute præcepti*.

But before I come to these I will consider something concerning escapes of felons, and what punishment lies upon *them* that permit it, which will open the consideration of what is every person's duty in this case; and by this escape I do not mean escapes suffered by she-
riffs

riffs or gaolers, but escapes suffered by villis, townships, or private persons.

If there be a murder or manslaughter committed either in the day or night in an inclosed town, if the murderer be not taken, the town or city shall be amerced upon a presentment thereof, either by the coroners or grand inquest before the justices of gaol-delivery. 3 E. 3. *Coron.* 299. But if it were a vill not inclosed; there if a murder were committed within the precinct of the vill, tho in the field, and the murderer not taken, if it were done in the night, the vill should not be amerced; but if it were in day-light, tho in the evening, the town should be amerced. 3 H. 7. *cap.* 1. 3 E. 3. *Coron.* 293. [73]

And the same law is if the killing were by a man by misadventure, if he escapes and be not taken. 3 E. 3. *Coron.* 302. for tho by the statute of *Marlebr. cap.* 26. that common fine or amercement called *murdrum* (*) was not to be imposed in cases of death *per infortunium*, yet the amercement called *escapium* took place even in that case. *Vide Braſton, Lib.* III. *cap.* 15.

If the malefactor were taken by the township, and delivered to the sheriff or his bailiff, or to the gaoler of the county, and then an escape happen, the township is not chargeable, but the sheriff or bailiff. 3 E. 3. *Coron.* 337.

But if he be in guard of the constable, and the constable is bringing him to the gaol, yea tho the gaoler refused to take him, if he escapes, it is a charge upon the vill. 3 E. 3. *Coron.* 346. 10 H. 4. 7. *a. Escape* 8. *per Gaſcoigne*; nay, tho in the flight he be slain for necessity of retaking him because he resists, yet it is an escape upon the vill. 3 E. 3. *Coron.* 328.

And in case the vill be not sufficient to answer the amercement, the hundred shall be charged therewith, and in default of the hundred, the county; and if the killing be out of any vill, the hundred is amerceable for the escape. 8 E. 2. *Coron.* 425. *Stamf. P. C. Lib.* I. *cap.* 31. *f.* 34. *b.*

But this is only in case of felony touching the death of a man, for there the fact is apparent, that the man is slain; but in case of other felony, as theft, there tho the thief be not taken, no amercement lies upon the town, nor other penalty at common law, but by the statute of *Winton, de quo infra*. [74]

(*) *Vide Part I. p.* 39. 425. 447.

But if they had a felon in their custody, or in the custody of the constable, and he escape, the vill had been amerceable, and so is the hundred, if they have him in their custody, or in the custody of the constable of the hundred, and suffer him to escape. 3 E. 3. *Coron.* 316.

The law used in the time of H. 3. when *Bracton* wrote, appears *Lib. III. cap. 10.* to be thus: if a man had committed manslaughter either by misfortune or otherwise, if he fled, and the jury were inquired of by the judge if he were *in decennā*, then the *decenna* was to be amerced by the court, because they had him not there; if he were not in any *decenna*, then the vill was to be amerced; because they received him an inhabitant, and had him not *in franco plegio*; for every one above twelve years old ought to be in frank-pledge, except clergymen, noblemen, and knights and their families (*): and therefore in the case of clergymen, noblemen and knights, if any of their family *de manupastu* committed a murder or manslaughter, the clergyman, nobleman or knight was amerced if the malefactor fled, unless some special custom had abrogated it, as in *Hertfordshire*: and thus did the practice long after continue: *vide* 8 E. 2. *Coron.* 428. *Si serviens alicujus domini in servitio suo existens facit feloniam & convincatur, quamvis post feloniam ipsius non receptavit, amerciandus est*; and 3 E. 3. *Itin. North'ton, Coron.* 203. It was presented, that *A.* had killed *B.* and it was demanded of the presenters, whether he were *in decennā*? They answered, *He was not*? Then it was demanded where he abode? They say with the parson of the town; and thereupon the parson was amerced for his *manupast*. Then it was demanded who was present when he slew him? They say *C.* It was then demanded of them, whether *C.* received him [took him]? They say *Not*; wherefore *C.* was amerced. Then it was demanded where the felon was? They say *he is escaped*; then it was demanded whether it were done in the day or the night? They answer *in the evening*; therefore the whole vill was amerced.

[75] Several things are observable in this case. 1. That if he had been *in decennā*, the *decenna* had been amerced, because they had not him present *ad standum recto in curiā*. 2. That because the parson nor his family were not by law to come to the view of frank-pledge, he was amerced for one that was of his family, one *de manupastu*. 3. That he that was present and took not the offender,

(*) *Vide Part I. p. 65. in notis.*

was also amerced. 4. That because the felony was committed in the day-time, and the felon escaped, the whole vill was amerced, 22 E. 3. *Coron.* 238. so in effect three amercements for one escape.

And note, that according to *Bracton*, *ubi supra*, he is *de manupastu*, *qui est ad victum & vestitum*, or *ad victum cum mercede*, as a household servant; and according to the antient law, he that entertained a man three nights, made him to be *de manupastu*.

This law of amercing the *decenna*, or him of whose family an offender is, is not abrogated, but yet it is not now used; but it was certainly a most excellent constitution, whereby every man was under the pledge of his master or father, with whom he lived, or must be within some *decenna* that may see him forthcoming: *vide Spelman in Glossar. Titul. Friburg & Leges Edvardi, cap. 19. 20. (a).*

As thus the vill is answerable for an escape, so is he that is present when a manslaughter or murder is committed, and doth not do his best endeavour to apprehend the malefactor, though he were not party or accessory to the crime; with this agrees 3 E. 2. *Coron.* 428. before-mentioned, where it is called only an amercement; but 8 E. 2. *Coron.* 395. he that was of full age, that was present when a manslaughter was committed, *et ne leva le maine d' attach le felon*, was committed to prison, till he made fine to the king, but he that was within age was discharged (*b*).

And tho in the book of 14 H. 7. 31. *b.* a person indicted for being present at a felony, without saying he was aiding and abetting, was discharged, it was because the indictment there was with intent to make him a felon, and not to charge him with a misdemeanor for not pursuing the felon: *vide Co. P. C. p. 117.* It is a misdemeanor, for which the party shall be fined and imprisoned. [76]

By that which hath been said, it appears, that the apprehending of a felon is in many cases a duty, and not arbitrary, even in cases of a private person, without any other warrant than what the law gives, and that the omission thereof is a misdemeanor, and punishable by fine or amercement.

And now therefore I come to consider touching the arrests by a private person in case of felony.

And this is of these kinds. 1. Where the party arrested hath really committed a felony, and this is known to the party arresting. 2. Where the party arrested hath really committed a felony, but it is only

(a) *Wilk. Leg. Anglo-Sax. p. 201.*

(b) *Vide Part I. p. 21.*

suspected, and not certainly known to the party arresting. 3. Where there hath been a felony committed, and the party arresting doth, upon probable grounds, suspect the person arrested to have committed it, tho in truth he did it not.

I. As to the first of these, where a person hath committed felony, and *A.* knows it.

It is true in this case, if the time and nature of the fact, and the condition of things will bear it, it is best to complain to a justice of peace, and have his warrant for the apprehending of him; or if that cannot be had in convenient time, then to call to his assistance the constable; but such the case may be, that the delay that must arise necessarily by these solemnities, may give the felon opportunity to escape; and therefore in this case *A.* without any other authority than what the law gives him, may arrest or apprehend the felon; and if he cannot do it by his own strength, he may call others to his assistance, or raise hue and cry for his apprehension; and if he doth not thus, he is punishable, as is above declared, if it can appear that he knew it.

And it will be all one, whether the felony were committed in the same county, or in any other county; for the law in this case makes *A.* an officer; and this was antiently the law, and still is. *Brañton Lib. ult. in fine, in criminalibus causis, ubi sequi debet capitale supplicium, vita videlicet vel mutilatio membrorum, non sequitur attachiamentum aliquod, sed corpus talis, quicumque ille fuerit, ab omnibus arrestetur, qui sunt ad fidem domini regis, sive inde præceptum habuerit, sive non habuerit;* and accordingly it is ruled, 10 E. 4. 17. b.

[77] that it is a good justification for a man in an action of false imprisonment to say, that the plaintiff committed a felony, and shew what, and the defendant arrested him, and delivered him to the constable, or he might have brought him to gaol by himself or his servant, as is there agreed.

But the safer way is, to bring him before a justice of peace, who may examine and commit him.

And as a private man may do thus upon a felony committed, so if he see danger of murder by a dangerous wound given, he may pursue the offender. 7 E. 3. 16. *Barre* 291.

And in both these cases, he may break open doors, if he be denied entrance, and if *de facto* the felon or malefactor be there, for the law makes him an officer in this case, as well as if he were a justice of peace or constable. 7 E. 3. 16. b.

Nay yet farther, if the felon resists or flies, so that he cannot be taken without killing him, this is justifiable, and no felony; but still it must be where he cannot be otherwise taken, for it is for advancement of justice, and suppression of felons, and therefore if they cannot be otherwise apprehended, it is lawful, as well as if *A.* were a constable, or had a warrant; and if the books that speak of this matter, be but carefully examined, it will appear that the law was so generally taken, tho he were pursued or taken without any formal process to the sheriff, and that as well before an arrest made, as after; and this appears in *terminis*, 22 *Affiz.* 55. 3 *E. 3. Coron.* 346, & 328, & 290. but indeed the books of 3 *E. 3. Coron.* 288, 289. are of a constable and watchman: but in 3 *E. 3. Coron.* 349. the townsmen that did it were fined 40s. but it seems it was more for the escape than the killing: *vide Stamf. P. C. Lib. I. cap. 6. f. 13. a. b. accordant.*

As to the statutes of *Magna Charta*, cap. 29. 25 *E. 3. cap. 4.* 28 *E. 3. cap. 3.* 42 *E. 3. cap. 3.* they do not at all concern this preparatory imprisonment of a felon, as shall be shewn in due time; [78] and therefore whatsoever hath been before said holds true in the first instance of his imprisonment, tho the party be not yet indicted.

II. As to the second case, *viz.* where a felony is committed by *B.* but *A.* that arrests him, doth not certainly know it, as not being present at the committing of it.

I take the law to be all one with the former case, only what he doth herein, he doth at his peril; for if in truth *B.* be a felon, then *A.* may arrest him, and may break a house to arrest him, if he be within the house, and refuses to render himself; yea, and if he will not suffer himself to be taken, he may in case of necessity be killed; but this still is at the peril of *A.* for if he be no felon, it may be manslaughter at least in *A.* if he doth it.

But how far forth this will be justifiable in case that *A.* hath a good cause of suspicion, will be considerable in the next enquiries.

III. The third case is, there is a felony committed, but whether committed by *B.* or not, *non constat*, and therefore we will suppose, that in truth it were not committed by *B.* but by some person else, yet *A.* hath probable causes to suspect *B.* to be the felon, and accordingly doth arrest him; this arrest is lawful and justifiable, and the reason is, because if a person should be punished by an action of trespass, or false imprisonment for an arrest of a man for felony under these circumstances,

circumstances, malefactors would escape to the common detriment of the people.

But to make good such a justification of imprisonment, 1. There must be in fact a felony committed by some person; for were there no felony, there can be ground of suspicion. Again, 2. The party, (if a private person), that arrests, must suspect *B.* to be the felon. 3. He must have reasonable causes of such suspicion, and these must be alledged and proved.

1. There must be a felony done; and therefore if a man be taken for suspicion of felony, and delivered to the constable, or remains in the custody of him that took him, yet if in truth no felony were committed, he may be let go at large, and no punishment shall ensue for the escape. *Kelw.* 34. *a. b.* But if a felony were committed, [79] though he that is taken for the suspicion thereof be in truth innocent, and it so appears to the constable, or him that arrests him; yet if he let him go before he be indicted, and acquitted or delivered by proclamation before the justices of gaol-delivery, the party letting him go shall be punished for an escape. 44 *Affiz.* 12. *Poulton de Pace*, *f.* 146. *b.* 5 *H.* 7. 4. 7 *H.* 4. 35. *a.*

2. The party that arrests him, must be he that suspects him, and regularly it cannot be done by another; and therefore if a man justifies in false imprisonment for suspicion, he must justify it as his own act, and not by the command of the sheriff or other officer, nor can another justify by the command of him that so suspects. 11 *E.* 4. 4. *b.*

But this doth not always hold true; for an officer of justice, may, in assistance of him that suspects, justify the imprisonment; as a constable, upon a complaint made to him by him that suspects, may justify; but he must allege his justification in the same manner as he that suspected ought, *viz.* a felony done and cause of suspicion; and therefore the party suspecting and desiring the constable's assistance must acquaint him with the whole matter, and the causes of his suspicion, otherwise he is not bound to assist him. 2 *H.* 7. 15. *b.* And in like manner a justice of peace being applied to by him that suspects and acquainted with the whole circumstances of the case (*).

And this appears beyond dispute even by the statute of 34 *E.* 3. *cap.* 1. whereby power is given to the justices of peace to arrest all those whom they find by indictment or by suspicion, and to put them in prison.

(*) *Vide Part I. p. 580.*

And the reason is apparent, namely, the justices of peace are made judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of their suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice's suspicion as well as theirs, and accordingly adjudged, *P. 43 Eliz. C. B. Croke, n. 35. Tatam's case (c)*, and therefore the saying of my lord Coke, *4 Instit. p. 177.* "That notwithstanding such warrant, or the aid of the constable upon such complaint, [80] " it is still the party's arrest, and not the constable's or justice's, and that he must be present, and that he cannot break open a door by virtue of such warrant," is neither warranted by the law nor the common practice (*); and in the book of *2 H. 7. 15. b.* where one justified in aid of the constable upon a felony done, and a suspicion and cause thereof, *ut infra*, it was ruled a good justification against the opinion of *Bryan*; and it is apparent by the statute of *5 E. 3. cap. 14.* "If any person hath any evil suspicion of persons to be robbers-men, wasters or draw-latches, they shall be incontinently arrested by the constables of the town, be it by day or night; and if they be arrested within franchises, they shall be delivered to the bailiff of the franchise; if in the gildable, to the sheriff, and kept in prison till the coming of the justices."

The suspicion may be by any person, yet the imprisonment must be by the constable; and the reason is that which is given before, because the constable is a proper officer, to whom complaints of this nature may be made.

And therefore if a felony be committed upon the goods of *A.* and the goods be found in the custody of *B.* and *A.* comes to a constable and shews him the case, and requires him to bring him before a justice; this is a good justification by *A.* in false imprisonment brought against him without so much as an averment, that he suspected him. *H. 4. Car. Rot. 513. Marbery and Porter, B. R. vide 2 E. 4. 8. b.*

But it is true, that he that is not an officer cannot justify by the command of him that suspects, if he also be no officer; and so are the books of *5 H. 7. 5. a. per Cu'. 12 Co. Rep. 92. Sir Antony Ashley's case, 11 E. 4. 4. b.*

But then the case is easily solved, for if a felony be committed, and *A.* hath probable cause to suspect *B.* and accordingly suspects *B.* and acquaints *C.* with the whole matter, *C.* upon this having probable

(c) *Cro. Eliz. p. 829.*

(*) *Vide Part. I. p. 579.*

cause to suspect *B.* tho he cannot justify the imprisonment of *B.* as by the command of *A.* that first suspected him, he may justify by his own suspicion; and the like of him that comes in aid of *A.* to arrest *B.* 5 *H.* 7. 4 & 5.

[81] 3. The third thing to be observed in this arrest by a private person upon suspicion is, that he hath a probable cause of suspicion.

And these probable causes are very many, as for instance common fame, 5 *H.* 7. 4. *b.* 2 *H.* 7. 15. *b.* 11 *E.* 4. 4. *b.* &c. hue and cry levied, 21 *H.* 7. 28. hath part of the goods found upon him, or be indicted of the like, 12 *Co. Rep.* 92. *Ashley's* case, party with him that committed the robbery. 7 *E.* 4. 20. *a.*

And note, that the law hath that care, that malefactors, tho but suspected, should be apprehended, that a man may alledge twenty causes of suspicion, and it shall not make his plea double, for one answer makes an issue upon the whole, viz. *de injuriâ suâ propriâ absque tali causâ*, and no issue shall be singly taken upon one cause of suspicion, where many causes are thus alledged. 2 *E.* 4. 8 & 9. 7 *E.* 4. 20. *a.*

Now what is to be done by a private person, that thus arrests a party upon suspicion of felony; if after such an arrest the party arresting discharge him without bringing him to a justice or constable, he shall be punished for the escape at the king's suit, but it makes not the imprisonment unlawful as to the party. 10 *E.* 4. 17. *b.*

Or he may carry him to the gaol, and if the gaoler receive him, he that made the arrest is discharged, 10 *E.* 4. 18. *a.* but he must not carry him to a gaol of any other county than where he is taken, unless either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 *E.* 4. 4.

Or he may deliver him to the constable of the vill, and that is a sufficient discharge, 10 *E.* 4. 17, *b.*

But the proper way is to bring him to a justice of peace, who may commit, or discharge, or bail him, as the case requires.

Yet if the party so arrested be sick and cannot be removed without danger of death, he may detain him in his own house, till he can reasonably bring him to a justice or officer, 2 *E.* 4. 8. *b.*

[82] The arrest of a man upon suspicion of felony by a private person is, as before is said, a thing permitted by law and therefore justifiable; but it is not a thing commanded by law, neither

is the party punishable, if he omit it, as in case where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's suspicion but himself (*).

And therefore there is not the same privilege in all points allowed to him that arrests upon suspicion, as to him that arrests upon hue and cry, or by warrant, or where he is present at the felony committed, and so knows it.

1. It seems he that arrests as a private man barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, *viz.* if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable, 4 *Co. Instit.* p. 177, 178. (but yet to prevent a murder or manslaughter a private person may break open a door, 12 *H.* 8. 2. *b.*) but he may enter by the doors open, and make the arrest in the house.

But *note*, that in all arrests he must acquaint the party with the cause of his arrest.

But in case of a known felony done by the party, or where a felony is done, and a constable comes and demands entrance upon a complaint to him, or by a justice of peace's warrant, or upon hue and cry; there the doors may be broken open upon notice and demand of entrance and refusal.

2. Again, if there be a felony committed by *B.* and *A.* is present and sees it, and pursues the felon, and he cannot be otherwise taken, and *A.* kills him in the pursuit, tho he have not arrested him, the law justifies him; and possibly the same law may be in case of an officer, a warrant, or hue and cry, tho the person be not guilty of the fact, if he refuses to submit to the arrest; but *de hoc infra*.

But if a felony be committed, and *A.* upon probable cause suspects *B.* to have been the felon, tho the law permits him to arrest *B.* tho in truth innocent, yet he cannot justify the killing of him upon his flight and refusing to submit, *justificari se permittere nolens*; [83] but if he kills him, it is at his peril; for if *B.* be innocent, it is at least manslaughter, *Co. P. C.* p. 56. 221. 22 *Affiz.* 55. and the reason is, because *B.* is not bound to take notice of *A.* as authorized to arrest him, as being no officer, nor having any warrant; it is true, a constable arresting in the king's name, or offering so to do, the party is

(*) *Vide Part I. p. 490.*

bound to take notice and submit, as hath been said, *Part I. cap. 37.* but a mere stranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for possibly he may think he came to rob him.

3. Yet farther, if an innocent person be actually arrested upon suspicion by a private person, all circumstances being duly observed, and he breaks away from the arrest, yet I do not think the person arresting can kill him, tho he cannot be otherwise taken, for the person arrested is not bound to take notice of that authority that the law gives to a private person in this case.

But then can he justify the beating or striking of him in case he cannot otherwise take him that thus makes the assault? As where a bailiff of the sheriff by warrant arresteth a person, tho he cannot strike or beat him before the arrest to take him; yet after the arrest and escape such bailiff may justify his beating, if he cannot otherwise retake him according to the opinion of the book, 2 *E. 4. 6. b.*

And it seems he cannot, but only lay his hands gently upon him to lay hold of him for the reason before given.

4. But then suppose that either before the arrest or after the arrest, *B.* draws his sword and assaults *A.* and *A.* presseth upon him either to take or detain him, and in the conflict *B.* kills *A.* is it murder in *B.* or if *A.* kills *B.* is it justifiable and no felony in *A.*?

If the bailiff of a sheriff is about to take a prisoner, and before he takes him the party draws his sword and kills him, this is murder, as is before said, *Part I. cap. 37.* And on the other side, if either after or before the arrest the bailiff upon assault made upon him kills the party, this is no felony, neither is he bound to give back to the wall. *Ca P. C. p. 56 & 221.*

It seems, that if the party arrested kills him that thus arrests upon suspicion, always supposed the party killing is innocent,) this is but manslaughter and not murder; and on the other side, if the party arresting kills the party arrested or intended to be arrested by him upon suspicion, that this is manslaughter; and tho the arrest in this case had been lawful, yet the party arresting hath not the same privilege, as in case of killing a man upon hue and cry, tho the party arrested after the arrest, or upon the attempt of the arrest, assaulted him that arrested him or attempted to arrest him. 1. Because in this case, tho the law impowers the party to arrest him, yet it is but a power of permission, not an injunction by the law, neither is he punishable if he had

had not made such an arrest; and so not like the case of an arrest by an officer, warrant of a justice, hue and cry, where it is a duty to arrest, and the party, that omits his duty in this case, is punishable by fine and imprisonment for his omission. 2. Because he might have had a legal warrant from a justice of peace, or called an officer to his assistance, and then he had been under a more effectual protection of the law in what he did in pursuance of his duty. 3. It would give too great a latitude for persons to be their own judges in this case, and to take away a man's life who is innocent, and possibly might not have sufficient assurance, that either a felony had been committed, or that he that arrests had a just or lawful cause of suspicion.

And it seems the law is the same, whatsoever the cause of suspicion were, yea altho the person were indicted for the offence, because a person innocent may be indicted, and because there is another way to bring him into an answer, namely process of *capias* to the sheriff, who is a known responsible officer. 3 E.. 3. *Coron.* 346.

And thus far concerning arresting by a private person upon suspicion.

See Burn. Tit. Arrest per tot. & Index to 2 Hawk. P. C. tit. Arrest. Foster. 136. 319, 320, and 4 Blacks. Com. ch. 21. of Arrests. pa. 289, &c.

C H A P. XI.

[85]

Concerning arrests or apprehension of felons, or persons suspected of felony by an officer.

THERE are certain officers and ministers of public justice, that *virtute officii* are empowered by law to arrest felons, or those that are suspected of felony, and that before conviction, and also before indictment.

And these are under a greater protection of the law in execution of this part of their office upon these two accounts. 1. Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this. 2. Because they are by law punishable, if they neglect their duty in it.

And therefore it is all the reason that can be, that they should have the greatest protection and encouragement in the due execution of their

their office, since their actings herein are not arbitrary but necessary duties, (not permissions,) and under severe punishments in their neglect thereof.

And hence it is, that these officers, that are thus intrusted, may without any other warrant but from themselves arrest felons, and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office, it is murder; and, on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof, nay for breach of the peace or just suspicion thereof, as night-walkers, persons unduly armed, shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or being apprehended shall rescue themselves and resist or fly so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony [86] in these officers or their assistants, that upon inevitable necessity kill them, tho possibly the parties killed are innocent, for by their resistance against the authority of the king in his officers, they draw their own blood upon themselves.

The officers that I herein principally intend are, 1. Justices of the peace. 2. Sheriffs. 3. Coroners. 4. Constables. 5. Watchmen. And when I mention these I also include all, that come in their aid and assistance; for every man in such cases is bound to be aiding and assisting to these officers upon their charge and summons, in preserving the peace and apprehending of malefactors, especially felons.

And if any being thereunto called shall not give their assistance, they are to be punished by fine and imprisonment, and consequently are under the common protection of the law equally with the officers themselves.

And that was the reason of the statutes of 7 *Jac. cap. 5* and 21 *Jac. cap. 12.* that gave power as well to assistants of the most usual peace-officers, as to the officers themselves, to plead the general issue, and give the special matter of their justification in evidence, and allow double costs to the defendant.

Wheresoever a private person may arrest a felon or person suspected, there any of these officers may do it; but of this sufficient hath been said before: I therefore come to that power, that concerns them specially as officers in this case.

I. *Justices of peace* have a double power as in relation to arrest of felons; one upon complaint of another person, whereof hereafter, *cap.* 13. Another primitive and original in themselves, whereof at present.

If a justice of peace see a felony, or other breach of the peace, committed in his presence, he may in his own person apprehend the felon.

And so he may by word command any person to apprehend him, and such command is a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal to apprehend the malefactor, 14 *H.* 7. 9. *b.* adjudged; and by *Fineux*, if there be any riot or breach of the peace like to happen by a tumultuous meeting, &c. he may command his servants or others to pre- [87] vent it by arresting the parties.

And *note*, that if the justice of peace hath either from himself or by a credible information from others knowledge of a felony done, and just cause of suspicion of any person, he may himself arrest and commit that person, 14 *H.* 7. 8. *per Keble*; and according to it are the express words of the statute of 34 *E.* 3. *cap.* 1. before-mentioned.

II. Secondly, As to the *sheriff*, it is ordaind by the statute of *Westminst.* 1. *cap.* 9. (*a*), "That all generally be ready and appointed at the commandment and summons of the sheriff, and at the cry of the country to sue and arrest felons, when any need shall be, as well within franchises as without, and they that will not so do, and thereof be attaint, shall make grievous fine to the king, and if default be found in the lord of the franchise, the king shall take the franchise to himself, &c. And if the sheriff, coroner, or bailiff, will not attach or arrest such felons there, as they may, or will not do their office for favour borne, to such misdoers, and be attaint, they shall have a year's imprisonment and after make grievous fine, if they have wherewith, and if not three years imprisonment.

By this statute the sheriff is not only enabled but enjoined to arrest felons, and all persons are required to be assisting to him therein upon his summons; and they are punishable by fine and imprisonment in default thereof.

(a) 2 *Co. Instit.* p. 172.

And altho the sheriff in his *Turn* had power to take presentments of felonies at common law, yet this was not intended barely of issuing precepts upon such inquisitions, but to a ministerial taking of felons as he was conservator of the peace, for his *Turn* was kept but twice in the year, but the occasions of taking felons were frequent.

And accordingly it was practised, *vide* 5 *H. 7. 5. a. in fine*, the sheriff arrested one suspected of felony, and no question of the lawfulness thereof.

[88] III. *Coroners*: Tho coroners had no power of taking inquisitions of any felony but the death of a man, as hath been shewn; and therefore by the express provision of the statute of 4 *E. 1. De officio coronatoris* he may not only make process but make hue and cry after them, yet by the statute of *Westm. 1. cap. 9.* above-mentioned he is a conservator of the peace in relation to all felonies, and can command them to be apprehended, tho he can take no inquisition concerning any but the death of a man.

IV. For the office of *constable* it is of twofold extent. 1. Ministerial and relative to the justices of peace, coroners, sheriffs, &c. whose precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conservator of the peace at common law.

By the original and inherent power in the constable he may for breach of the peace and some misdemeanors, less than felony, imprison a person.

If a man leaves an infant in the cold to the intent to destroy it, or charge the parish, the constable may take him and put him in the stocks. *M. 34 & 35 Eliz. B. R. Croke, n. 1. Beal and Charter, p. 287.*

So if a constable be assaulted by *A.* tho it be in his own case, he may imprison the party and carry him to gaol; but for opprobrious words, or a general hindrance of him to summon the trained bands to attend the lord mayor of London upon his precept, he cannot justify the imprisoning of a person in the *Compter, T. 31 Eliz. Rot. 1521. Fulwood and Gascoign (s)*; but he must bring him to a justice of peace: *nota*, in the justification it was also adjudged, that he assaulted him: *ideo quære* of that judgment.

And what may be done by a constable may be done by his deputy, for by the law a constable may make a deputy, and he is within the statute of 7 *Jac. cap. 5.* to plead the general issue. *M. 13 Jac. B. R. Phelps and Winchcombe (d).*

If *A.* menace *B.* to kill him, upon complaint thereof to the constable he may arrest him and put him into the stocks, till he find surety of the peace, 44 *E. 3. Barre 202.* but that is [89] intended, that he may detain him till he can conveniently bring him to a justice of peace and to avoid the present danger, for tho some of the old books seem to hold, that the constable may take sureties of the peace and detain a person till he gives him sureties, yet it cannot be by recognizance but by bond, and that for an affray or menace of breach of the peace done in his view. *H. 37 Eliz. B. R. Croke, n. 25. Sharrock and Hanmer (e).*

If information be given to a constable, that a man and woman are in incontinency together, he may take the neighbours and arrest them, and commit them to prison to find sureties for their good behaviour, 1 *H. 7. 6. a.* there the custom of *London* indeed is pleaded; but 13 *H. 7. 10. b.* adjudged, that it is a good justification for the constable or any in assistance to plead, that *A.* holds a messuage in the same vill, and she kept persons suspected of common bawdry, and the plaintiff suspiciously resorted to that house with women of ill fame, and that he arrested the plaintiff to find sureties for the good behaviour.

The constable may arrest suspicious night walkers (*f*) by the statute of 5 *E. 3. cap. 14.* and men that ride armed in fair or markets or elsewhere. *Stat. 2 E. 3. cap. 3. de Northampton.*

And it appears by the books before-mentioned, that in cases of arrests of this or the like nature, the constable may execute his office upon information and request of others, that suspect and charge the

(*d*) *Moor p. 845.*

(*e*) *Cro. Eliz. p. 375.*

(*f*) But then that suspicion must not be a mere causeless suspicion, but must be founded upon some probable reason; and so it was ruled in the case of the *Queen and Tootley, Mich. 1709.* for the murder of *Dent*, who was kild in aiding the constable, who had taken up a woman, that was walking the street upon suspicion, as being a woman of ill fame. *C. J. Holt* delivered the resolution of the court, that it was not murder, and gave this for one reason,

“ That it was not lawful even for a legal
“ constable to take up a woman upon a
“ bare suspicion only, having been guilty
“ of no breach of the peace nor any un-
“ lawful act: and as to the case in 13 *H. 7.*
“ 10. the reason thereof was, because it
“ was in the view of the constable, who
“ found her misdoing; that of late, con-
“ stables made a practice of taking up
“ people only for walking the streets, but
“ he knew not whence they had such an
“ authority. *MS. Rep.*

offenders, nay tho it be but with suspicion thereof. 5 E. 3. cap. 14. 13 H. 7. 10. b. 44 E. 3. Barre 202.

But if there be an affray, tho to prevent it, or in the time of the affray the constable may upon information or complaint arrest the offender, yet it is held, that if the affray be past, and no danger of death, the constable cannot arrest the parties without a warrant from a justice of peace. 38 E. 3. B. *Faux Imprisonment* 6.

But the law seems contrary, for tho in that case he cannot take surety of the peace himself, yet upon a complaint to him he may arrest the party to bring him before a justice to find surety of the peace, or for appearance. 44 E. 3. Barre 202. 35 Eliz. *Sharrock's case*!

Now as touching the constable's power of arresting *ex officio* in relation to felonies it may come under these considerations, 1. What his power is to arrest when a felony is *certainly* committed. 2. What his power is to arrest in cases of *suspicion* of felony. 3. What his power is in case of *danger* of felony, tho none be committed, as in case of affrays or dangerous wounding.

1. As to the first of these, where a felony is committed, it is of all hands agreed, that he may *ex officio* arrest and imprison the felon till he can conveniently be conveyed to a justice of peace or the common gaol.

And it will be all one, whether the felony were committed in the same vill, or in any other vill or county, if the felons be within the vill where he is constable.

And this appears clearly by the books of 2 H. 7. 15 b. 7 E. 4. 20. a. and divers others, and by the statute of *Westm.* 1. cap. 9. 5 E. 3. cap. 14.

And in that case it is on all hands agreed.

1. That he may break open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable.

2. That if in such an attempt of arrest the constable or any that come in his assistance be kild after competent notice that he is constable, it is murder.

3. That if the felon resist and cannot be taken, whether [91] it be after the arrest or before, the killing of the felon, who cannot be otherwise taken, is no felony.

And the reason of all this is, because he is *ex officio* a conservator of the peace, and is not only permitted but by law injoind to take a felon,

felon, and if he omits his duty herein, he is indictable and subject to a fine and imprisonment.

And it is not material, whether he saw the felony committed, or hath it only by complaint or information; for as well in one case as the other he is bound to apprehend the felon, and make search after him within the limits of his jurisdiction, and to raise *hue and cry* upon him; and certainly what may be done upon *hue and cry* raised upon a felon may be done by that constable who upon the first complaint raiseth it; and the law gives him protection in the execution of his office, and will never punish him in the necessary pursuit of what it enjoins him.

And with this all the before cited books in the precedent chapter do agree; for I have before therein determin'd, that in this case a private person may kill a felon, who is really such, if he cannot otherwise be taken; *vide supra*, p. 77.

2. I come to the *second*, namely what if there be a felony done, (suppose a robbery upon *A.*) and *A.* suspects *B.* upon probable grounds to be the felon, and acquaints the constable with it, and desires his aid to apprehend him; in this case I say,

1. That the constable may apprehend *B.* upon this account, tho the suspicion arise in *A.* at first; and with this agree the statutes of 3 E. 1. cap. 9. and 5 E. 3. cap. 14. and the books of 2 E. 4. 9. a. 5 Co. Rep. 91. b. *Semain's case*, *Dalt. cap. 109. p. 292. (g)*, 13 E. 4. 9. a. accords 2 H. 7. 15. b. tho *Brian* be to the contrary; but there are to be these circumstances to accompany it, 1. *A.* the person suspecting ought to be present, for the justification is, that he did aid *A.* in taking the party suspected, 2 H. 7. 15. b. He ought to inquire and examine the circumstances and causes of the suspicion of *A.* which tho he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby it may become his suspicion as well as the suspicion of *A.* [92] And if the constable should not be allow'd this latitude in cases of this nature, many felons would escape, and the party arrested hath no prejudice thereby, for the justice of the peace, to whom in such cases he is properly to be brought, may consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged. 3. But there must be a felony in fact

done, and the constable must be ascertained of *that*, and aver it in his plea, and it is issuable.

2. Consequently, if the constable upon such an arrest or attempt thereof be kild, it is murder as well as in the former case.

3. That in such case, if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant. 13 E. 4. 9. a. for it is a proceeding for the king by persons by law authorized, and therefore there is virtually a *non omittas* in the actings of their authority.

And the reason of the difference between private persons arresting upon suspicion and constables is, 1. Because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable he is punishable if he omits it upon complaint. 2. Because it would be a great inconvenience if every private man upon pretence of suspicion should break open houses, for they may not be of known value or responsible; but a constable is an officer known within the vill, and his authority known, and is presumed of sufficiency, for he is chosen by the leet, like a bailiff *jurus & conus*, who need not shew his warrant (*).

Again it seems to me, that if a person thus charged with suspicion of felony upon just grounds of suspicion, and where a felony is actually committed, tho he be innocent, yet if he resist the officer [93] after notice that he is the officer, and assault him, if the officer kill him, it is no murder.

But it may be more questionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is suspected and innocent, if he cannot be otherwise taken, as he may a felon, as before is shewn, p. 77. but it seems he may, and it is no felony no more than in the former case, for these reasons, 1. Because the constable is obliged to do his office in case of a probable suspicion, as well as in case of an actual felony. 2. Because he cannot judge, whether the party be guilty or not, till he comes to his trial, which cannot be till he be apprehended. 3. Because the party draws upon himself this inconvenience, and makes himself suspected by his very flight from the known officer.

(*) Vide Part I. p. 461.

And this is the reason why, tho a man be innocent of a felony committed, yet if he fled for it, and *that* be presented by the coroner, or found by the jury *that* acquits him of the felony, yet he forfeits his goods, because it was his own fault that he did not *stare juri*, and brought upon himself the just cause of suspicion, and put the country to trouble and hazard in pursuing him.

And yet it is true, that if the felon were not once in the hands of an officer that had warrant to arrest, as if he be in the house, and fly out at a back-door before the officer seizeth him, this is not an escape in the officer, 27 *Affiz.* 9. But on the other side it may be said, that it is nevertheless an escape in the township, for which they shall be amerced, tho the person were never actually taken; *quod vide supra*, cap. 10.

And therefore it is at the peril of the whole vill, if they take not a felon (*), and when he is upon probable cause suspected, he is presumed to be such, till the contrary appear upon his trial.

And therefore, as before is said, a justice of peace cannot discharge a person brought before him but for suspicion of felony, in case a felony were committed, but must either bail or commit him.

And upon the reason before given it seems, that if a person be charged to the constable for felony, or suspicion of [94] felony in the county of *A.* and the constable charge him in the king's name to yield himself, and he either before or after the arrest pursue him into another vill, nay into another county, the constable hath the same privilege and protection upon his pursuit and arrest, as if he were taken in the county of *A.* tho yet he must bring him before the justice of that county where he was taken: *vide Crompton de Pace*, p. 172, 173. *Dalt.* p. 340. (*h*).

But for this latter case I take the law to be all one in case of a constable having a warrant to arrest a felon, or not having one, but doing it by his own intrinsic power *virtute officii*, namely, that if he hath or hath not a warrant from a justice of peace to arrest a felon, if the felon fly into another county before arrest, he is to be brought before a justice of that county, or to the gaol of that county, where he is arrested; but if he were once arrested and escape, and upon fresh suit he is taken by the constable in another county, yet he may

(*) This holds only as to felony touching the death of a man, but not in case of other felony, as theft, &c. *vide supra*,

p. 73.

(*h*) *New Edit.* p. 534.

be brought back to the justice, or gaol of that county where he was first arrested (*); for in that case in supposition of law he is always in custody by force and authority of the first arrest, as well where the arrest was *virtute officii*, as where done by a warrant. *Vide 2 E. 4. 6. b. 13 E. 4. 8. b.*

And thus far touching the second case.

3. The *third* case is, where a felony is not yet committed, but in danger to be committed.

If *A.* hath wounded *B.* so that he is in danger of death, and *A.* flies and takes his house, and shuts the doors, and will not open them, the constable of the vill where it is done, or upon hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable. *7 E. 3. 16. b. Barre 291.*

And in that case, if the constable be kild, it is murder; if he kill *A.* if he cannot be otherwise taken, it is no felony, but excusable and justifiable by the necessity caused by the obstinacy and default of *A.*

[95] If there be an affray in the house, where the doors are shut, whereby there is likely to be manslaughter or bloodshed committed, the constable of the vill having notice thereof, and demanding entrance, if they *within* refuse to do it, but continue the affray, the constable may break open the doors to keep the peace and prevent the danger.

Nay yet farther, if there be disorderly drinking or noise in an house at an unreasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; and this is constantly used in *London* and *Middlesex*.

I come now in the *last* place to consider what the constable is to do with his prisoner that he hath thus arrested for felony, or other causes above-mentiond.

In case of a sudden affray through passion or excess of drink, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, tho he delivers them afterwards, or till he can bring them before a justice of peace.

If an offense be committed, for which the constable may arrest, he may convey them to the sheriff, or his gaoler of the county; and

(*) *Vide Part I. p. 580.*

if it be within a franchise, he may deliver them to the gaol of the franchise, and they are bound to receive them without taking any fine for the same by the statute of 4 E. 3. cap. 10. vide 5 H. 4. cap. 10. 23 H. 8. cap. 2. But the safest and best way in all cases, is to bring them to a justice of peace, and by them the prisoner may be bailed or committed, as the case shall require; but till they are bailed or discharged, or the sheriff or gaoler hath received them, they are still under the charge of the constable that took them. 10 H. 4. 7. a. *Escape* 6. Till the constable can conveniently convey the parties arrested to a justice of peace, or the common gaol, as when the arrest is in or near night, he may detain the party in the stocks; or if there be no stocks in that vill, he may bring them to the stocks of the next adjacent vill.

And if the person be of quality or sick, the constable may [keep him in an house (*i*)] for a day and a night at least, [96] and in some cases of necessity for a longer time, till he can with safety and conveniency convey him to a justice of peace, or the common gaol. 20 E. 4. 6. b. 22 E. 4. 35. b. *Dalt.* p. 340.

The charges of sending malefactors to gaol by the common law, is to be borne by the vill where they are apprehended. 3 E. 3. *Coron.* 328. 4 E. 3. cap. 10.

But now by the statute of 3 Jac. cap. 10. the charge is to be borne by the prisoner, if he hath wherewith, the same to be levied by warrant of the justices of peace; and if he hath not wherewith, then the charge to be borne by the parish, township, or tithing, where the offender is apprehended, by a tax or rate to be made, as by the said act is prescribed.

And what I have herein said touching the constable is applicable to a tithing-man, headborough, burtholder, for their authority is much the same.

But the constable of the hundred is a distinct officer, and introduced upon the statute of *Winton*, vide H. 37 Eliz. B. R. *Croke*, n. 25. *Sharrock* and *Hanmer*; yet he seems to be a conservator of the peace.

V. *Watchmen*: Watchers are of three kinds, 1. That which is appointed by the statute of *Winton*, cap. 4. which is that from *Ascension-day* until *Michaelmas*, watches shall be kept in all towns from

(i) These words are not in the MS. but they or others to the like effect are manifestly wanted to supply the sense.

sun-setting to sun-rising in boroughs, &c. by twelve, in other towns by six or four, according to the number of the inhabitants: this watch is to be set by the constable, and the neglect thereof punishable by 5 H. 4. cap. 3. Their power is to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be delivered to the sheriff, viz. to the common gaol, there to remain until they be in due manner delivered; and if they will not obey the arrest, hue and cry shall be levied upon them; but this watch extends only between *Ascension day* and *Michaelmas*.

[97] 2. But there is another watch that may be kept by the constable *ex officio*, which may extend to other times, because there be other things under his charge, as a conservator of the peace, as for the purpose to raise or pursue hue and cry upon robberies committed by the statute of *Winton*, cap. 1. to search for lodgers in suburbs of cities, that are suspicious persons, which is to be done every week, or at least once in fifteen days by the same statute, cap. 4. for such as ride or go armed by the statute of 2 E. 3. cap. 3. for night-walkers and persons suspicious either by night or day by the statute of 5 E. 3. cap. 14.

And altho a constable is not bound to any precise time for this kind of watch, nor punishable, if he omit it barely for the omission, if he be ready upon occasion to do his office, when required in these cases, yet it is in his power to hold such watches, as often as he pleases, and it is convenient and justifiable, and herein the watchmen are the ministers and assistants of the constable, and are under the same protection with him, and may act as he doth; and regularly he ought to be in company with them in their walk and watch.

3. There is yet a third kind of watch, which is by authority of the justices of peace, which may be held at other times than the statute of *Winton* appoints, and the watch thus appointed hath the same power as either of the former; and this seems to be within the power of any one justice of peace by the first *Assignavimus* in his commission; vide *Lamb. Juslic. Lib. I. cap. 20. p. 185. Dalt. cap. 60. p. 142. (k)*, and cap. 109 p. 292. (l); but the safer way and more usual is by order of the sessions of the peace or of the court of king's bench, which hath the highest ordinary authority in matters of the peace and preservation thereof.

(k) *New Edit. cap. 104. p. 352.*

(l) *New Edit. cap. 109. p. 536.*

Now a watchman hath a double protection of the law, *viz.* 1. As an assistant to the constable, when the constable is present or in the watch, for so every man, who is assisting to the constable in the execution of his office, hath the same protection, that the law gives the constable. 2. Purely as a watchman set by [98] order of law; and the law takes notice of his authority *sub eo nomine*, and therefore killing of a watchman in execution of his office is murder. *Co. P. C. cap. 7. p. 52. 9 Co. Rep. 66. a. Mackally's case.*

And such a watchman may apprehend night-walkers and commit them to custody till the morning, and also felons and persons suspected of felony.

And thus far of arrests *virtute officii*.

See Burn. Tit. Arrest. per tot. Index to 2 Hawk. P. C. Tit. Arrest. Foster 136, 319, 320 & 4. Blackl. Com. ch. 21. Of arrests, pa. 289, &c. See Burn. Tit. Constable. Burn. tit. Watch.

CHAP. XII.

Of arrests of felons upon hue and cry raised.

HUE and cry is the old common law process after felons and such as have dangerously wounded any person: And this hath received great countenance and authority by several acts of parliament.

By the statute of *Westm. 1. cap. 9. (a)*, it is enacted, "That all be ready and apparelled at the summons of the sheriff & a cry de pays to pursue and arrest felons as well within franchises as without; and if they do it not and be thereof attaint, *le roy prendra a eux grevement*, they are to be indicted and fined for the neglect.

By the statute of 4 E. 1. *De officio coronatoris* "Hue and cry shall be levied for all murders, burglaries, men-slain, or in peril to be slain, as other-where is used in *England*, and all shall follow the hue and steps as near as they can; and he that doth not, and is convict thereof, shall be attached to be before the justices in eyre."

By the statute of *Winton, cap. 1.* "From henceforth every county shall be so well kept, that immediately upon robberies and

(a) 2 Co. Inst. p. 171.

“ felonies committed fresh suit shall be made from town to town,
 “ and from country to country :” and *cap.* 4. “ If any will not
 “ obey the arrest of the town, where night-walkers pass, they
 “ shall levy *hue* and *cry* upon them ; and such as keep the town,
 “ (*viz.* the bailiff or constable), shall follow with *hue* and *cry* with
 “ all the town and the towns near ; and so *hue* and *cry* shall be made
 “ from town to town, until they are taken and delivered to the she-
 “ riff ; and for arrestments of such strangers none shall be pu-
 “ nished.”

And this is in truth but the antient law ; thus it appears by *Bracton*,
Lib. III. *cap.* 1. where he mentions a provision *per dominum regem*
& ejus consilium, (which must be intended an antient act of parlia-
 ment,) *quod omnes tam milites quam alii, qui sunt quindecim annorum*
& amplius, jurare debent, quod utlegatos, murtheratores, robbatores, &
burglatores non receptabunt, nec iis consentirent, nec eorum receptatori-
bus, & si quos tales noverint, eos attachiari faciem, & hoc vice-comiti
& bellivis suis monstrabunt, & si hucsum vel clamorem de talibus au-
diverint, statim audito clamore sequentur cum familiâ & hominibus
de terrâ suâ ()*.

And it is one of the articles of inquiry in the leet in the statute
de visu franci plegii, de hues levies & nient pursues, and among the
capitula Itineris de hucfio levato & non secuto : vide Coke super stat.
Westm. 1. *cap.* 9. 2 *Instit.* p. 172.

And altho it is a good course to have a justice of peace to direct
 his warrant for raising *hue* and *cry* to prevent causeless *hues* and *cries*,
 yet it is neither of absolute necessity nor sometimes convenient ; for
 the felons may escape before the justice can be found, and *hue* and *cry*
 was part of the law before the statute of 1 *E.* 3. *cap.* 16. which first
 instituted justices of peace.

And altho also it is specially incumbent upon constables to pursue
hue and *cry*, when called upon, and they are severally punished, if
 they neglect it (*b*), and it prevents many inconveniencies, if they be
 there ; for it gives a greater authority to their pursuit, and
 [100] enables the pursuants in his assistance to plead the general

(*) *Vide Part I. p. 23 & 24. in notis.*

(b) *Ey* 8 *Geo.* 2. *cap.* 16. “ If any
 “ constable, headborough, &c. within the
 “ hundred wherein any robbery shall hap-
 “ pen, shall refuse or neglect to make
 “ *hue* and *cry* after the felons with the

“ utmost expedition, as soon as he shall
 “ receive notice thereof, he shall, for
 “ every such refusal or neglect, forfeit
 “ five pounds, one half to the king, and
 “ the other half to such person as shall
 “ sue for the same.”

issue upon the statutes of 7 & 21 *Jac.* without being driven to special pleading; and therefore to prevent inconveniencies that may happen by unruliness, it is most adviseable, that the constable be called to this action.

Yet upon a robbery or other felony committed, *hue* and *cry* may be raised by the country in the absence of the constable, it is therefore called *Cry de pais*.

Neither is there any inconvenience considerable in it; for if *hue* and *cry* be raised without cause, they that raise it are punishable by fine and imprisonment. 2 *Co. Instit.* p. 173.

And accordingly it was agreed by the two chief justices and three other judges, upon the trial of *Packhurst*, *Jackson*, and others, who were all convicted of murder, and executed, for killing two of the countrymen that followed them, being highway robbers. *Lent vacation, anno Car.* 2. 26.

In this matter of *hue* and *cry* these things are considerable, *viz.*
1. By whom it is to be levied. 2. How it is to be levied. 3. In what manner to be pursued. 4. What may be done by them that pursue it. 5. How punished, if omitted or neglected.

I. *Hue* and *Cry* may be raised as well by an officer of justice, as by the precept of a justice of peace upon information of a felony.

Or it may be raised by any private person that is robbed, or knows of any felony.

II. Touching the manner of it: It is diverse according to a variety of circumstances. 1. The party that levies it ought to come to the constable of the vill, and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make *hue* and *cry* after such as may be probably suspected as being persons vagrant

in the same night, for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found (*c*).

III. In what manner it is to be pursued. 1. The constable is to make search in his own vill, 2 *E.* 4. 8 & 9. 2. He is to raise all the neighbouring vills next about, *Crompt. de Pace*, f. 178. *b.* 3. It is to be pursued with horse and foot: *vide* 27 *Eliz. cap.* 13. *Dalt. cap.* 28. p. 75. (*d*), *per direction de Hyde*, chief justice.

IV. What may be done in pursuance of a *hue and cry* levied, and therein I think as followeth:

1. That in case of *hue and cry* once raised and levied upon supposal of a felony committed, tho in truth there was no felony committed, yet those that pursue *hue and cry* may arrest and proceed, as if so be a felony had been really committed.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon *hue and cry* levied do extremely differ: for in the former, there must be a felony averred to be done, and it is issuable; but in the latter, *viz.* upon *hue and cry* it need not be averred, but the *hue and cry* levied upon information of a felony is sufficient, tho perchance the information were false; and therefore I do not find any averment of a felony committed in case of a justification of an im- [102] prisonment upon *hue and cry.* 5 *H.* 7. 5. *a.* 21 *H.* 7. 28. *a.* *per Rede*, 2 *E.* 4. 8 & 9

And the reasons hereof are these. 1. Because the constable cannot examine the truth or falshood of the suggestion of him that first levied it, for he cannot administer him an oath, and if he should forbear his pursuit of the *hue and cry*, till it be examined by a justice of peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because the constable is by the acts of parliament

(*c*) By 27 *Eliz. cap.* 13. To the levying of *hue and cry*, so as to charge the hundred for any robbery it is requisite, "That the party robbed do, with all convenient speed, give notice thereof to the inhabitants of some town, village, or hamlet, near the place where the robbery was committed;" And by 8 *Geo.* 2. *cap.* 16. it is further required, "That the party robbed do, withall convenient speed, give notice thereof to the constable, headborough, &c. of some town, &c. near the place of the robbery, or leave notice in writing of

"such robbery at the dwelling-house of such constable, &c. describing, as far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery; and also within twenty days next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing the felon or felons, and the time and place of such robbery, together with the goods whereof he was robbed." See 2 *WILSON* 112, 113.

(*d*) *New Edit. cap.* 54. p. 169.

before-mentiond compellible to pursue *hue* and *cry*, and he is punishable, and so are those of the vill, if they do it not, as appears by the acts of parliament above-mentiond. 3. Because he that first raiseth *hue* and *cry*, where no felony is committed, *viz.* the person that giveth the false information, is severely punishable by fine and imprisonment, if the information be false. 21 *H.* 7. 28. *a.* 29 *E.* 3. 39. *a. b.* 2 *Co. Instit.* p. 173.

And therefore if he raise a *hue* and *cry* upon a person that is innocent, yet they that pursue the *hue* and *cry*, may justify the imprisonment of that innocent person, and the raiser is punishable; and by the same reason, if he give notice of a felony committed, when there was in truth none.

2. If *hue* and *cry* be raised against a person certain for felony, tho possibly he is innocent, yet the constables, and those that follow the *hue* and *cry*, may arrest and imprison him in the common gaol, or carry him to a justice of peace.

3. If the person pursued by *hue* and *cry* be in a house, and the doors are shut, and refused to be opened, upon demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case where he may arrest, tho it be only a suspicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case: *vide* 5 *Co. Rep.* 92. *b.* *Semain's case.* And the same law is upon a dangerous wound given, and a *hue* and *cry* levied upon the offender. 7 *E.* 3. 16. *b.* *Barre* 291.

And it seems in this case, that if he cannot be otherwise taken, he may be kild, and the necessity excuseth the constable: *vide* *Part I. cap.* 9. p. 53.

4. Upon *hue* and *cry* levied against any person, or where any *hue* and *cry* comes to a constable, whether the person be [103] certain or uncertain, the constable may search in suspected places within his vill for the apprehending of the felons. *Dalt. cap.* 28. p. 75. (*c*), *Crompt. de Pace*, f. 178. *b.* 2 *E.* 4. 8. *b.*

But tho he may search suspected places or houses, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person against whom the *hue* and *cry* is levied be there, and then it is true he may; therefore in case of such a search,

the breaking open the door is at his peril, *viz.* justifiable, if he be there; not justifiable, if he be not there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal before doors can be broken.

5. If the *hue* and *cry* be not against a person certain, but by description of his stature, person, clothes, horse, &c. the *hue* and *cry* doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant, it is a kind of process, that the law allows (not usual in other cases), *viz.* to arrest a person by description.

6. But if the *hue* and *cry* be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a *hue* and *cry* is good, as hath been said, and must be pursued, tho no person certain be named or described.

And therefore in this case all that can be done is for those that pursue the *hue* and *cry*, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like: *vide* 2 E. 4. 8. b.

[104] And here the justification of the imprisonment is mixed partly upon the *hue* and *cry*, and partly upon their own suspicion; and therefore, 1. In respect that it is upon *hue* and *cry* there needs no averment that the felony was done, yet it must be averred; that an information was given, that the felony was done, if the arrest be by that constable that first received the information, and so raised the *hue* and *cry*; or if the arrest were made by that constable, or those vills to whom the *hue* and *cry* came at the second hand, it must be averred that such a *hue* and *cry* came to them purporting such a felony to be done; but, 2. Also in as much as the *hue* and *cry* neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill, he that arrests any person upon such general *hue* and *cry* must aver that he suspected, and shew a reasonable cause of suspicion.

But

But now by the statute of 7 *Jac. cap. 5.* the constable or any that come in his assistance, even in this case of *hue and cry*, may plead the general issue, and give the whole matter of the justification in evidence for the pursuit of *hue and cry*, tho performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but as his deputies or assistants within the precincts of their constable-wick.

V. For the last matter, how the neglect of the pursuit of *hue and cry* is to be punished, it hath been before declared upon the statutes of 3 *E. 1. cap. 9.* 4 *E. 1.* and 13 *E. 1.* of *Winton*, they are to be indicted, fined and imprisoned.

Burn. tit. Hue and Cry. Index to 2 Hawk. P. C. tit. Hue and Cry. 4 Blackf. Com. ch. 21. p. 293.

CHAP. XIII.

[105]

Arrests of felons virtute præcepti, or of warrants.

I COME now to consider of arrests of felons or persons suspected of felony by warrant or precept, namely not of precepts that issue upon matter of record, as upon appeals or indictments, which regularly are to be by writ, but such warrants as are preparatory to it, or for conservation of the peace.

And herein regularly all courts and persons, that have judicial power by the common law, or by act of parliament for the conservation of the peace, have power to grant warrants for arresting of felons; but such as are simply ministerial and have no jurisdiction, as constables, cannot issue warrants for that purpose, but must do their office either alone, or with others called to their assistance.

The court of king's bench hath not only a power to issue writs upon indictments or appeals before them, but have also power by order to command the sheriff of the county where they sit, or the marshal of the court, to apprehend felons or disturbers of the peace, and bring them before the court; and this is warrantable by the custom of the court, which is part of the law of the land.

Yea I have known by great advice, that where there hath been information upon oath of a breach of the peace, and a design by
persons

persons whose names could not be known, to commit a riot or breach of the peace, an order hath been made by the court to the sheriff to bring before them such persons as should be probably suspected to be parties therein, and to bring them into the court, *M. 23 Cur. 2.* in *Storie's* case, for attempting to take away the daughter of *Mrs. Gilburn* with masks and vizards.

See before *cap. 1.* concerning the king's bench.

[106] A commission issues out of the *chancery* under the great seal to take persons that were notoriously famed of felony or trespass, tho they were not indicted, and by virtue hereof the commissioners issue a precept to *B.* to take *J. S.* that had dangerously wounded another; this was admitted a good justification in the officer, tho the commission itself was against law, *24 E. 3. 9. B. Faux Imprisonment 9. Vide simile 42 Affiz. 5.* where a commission issuing out of *chancery* to take *J. S.* and his goods, before he was indicted, is ruled to be against law.

And therefore I would never advise those general proclamations, that have sometimes issued, to take certain persons notoriously suspected of felony but not indicted.

It is true, that such a proclamation may be a means to give notice of felons, but so it may perchance include true men; and therefore what by law a constable, sheriff, officer, or private persons may do in arresting of felons or suspected persons without such a proclamation may be justifiable, but not by virtue of the proclamation, neither can any justification be made by virtue of it; and therefore such proclamations against persons not indicted are against law, and may bring great inconveniencies, 1. By leading the country into an error. 2. By the example itself, which may be of ill consequence to honest men, as well as of use to apprehend felons.

27 Affiz. 35. A man was indicted of felony before justices of *oyer and terminer*: It is admitted, that the justices may not only award process of outlawry thereupon, but may also issue a commission (which is no other than a warrant under their hands and seals) to take the party, and that by virtue of such a warrant or commission they may break open doors, but they must shew their commission, if demanded.

By the common law the sheriff of the county might give out a warrant for the apprehending a felon before indictment; and this is farther confirmed by the statute of *3 E. 1. cap. 9. au commandment,*

Et a les summons de viscount Et au cry de pays must be understood disjunctively, (*or at the cry of the country*) for the sheriff had jurisdiction at the common law to take indictments of old felonies in his *Turn*; and so he hath still, tho he is not now to make process upon them by the statute of 1 *E. 4. cap. 2.* [107]

The coroners have also power to attach manslaughterers by their warrants after inquisition, whereby they are found guilty, but that seems not to be all their power; but they may make out warrants for apprehending those persons that are not, or cannot be presented before them, as those that were present and not guilty; nay also of burglars and robbers, and yet they cannot take an inquisition touching them, this appears evidently by the statutes of 3 *E. 1. cap. 9.* and 4 *E. 1. Officium coronatoris.* And with this agrees the common usage at this day for the coroners to take manslaughterers before their inquisition be taken, for many times the inquest is long in their inquiry, and the offender may escape, if he stay till the inquisition delivered up.

But because at this day the greatest part of the business of this nature is dispatched by justices of the peace, I shall be more large touching their warrants, wherein nevertheless much of what is said therein will be applicable to the warrants that issue in like cases by other persons.

And therein I shall principally consider these particulars, 1. When and in what cases they may issue their warrants for the apprehending of felons. 2. To whom. 3. How and in what manner such precept or warrant is to issue. 4. What may be done by the officer in pursuance thereof.

1. As touching the first, in what cases justices of peace may make warrants for the taking of felons or persons suspect of felony.

My lord *Coke* in his jurisdiction of courts, *cap. 31. p. 176, 177.* hath delivered certain tenets, which, if they should hold to be law, would much abridge the power of justices of peace, and condemn the constant and usual practice, and give a loose to felons to escape unpunished in most cases (*), *viz.* 1. That a justice of peace cannot upon complaint issue a warrant to apprehend a felon before indictment, grounding himself upon the hasty opinion of *Fitzherbert* and *Brudnell*, 14 *H. 8. 16. a.* who yet hold the officer excused, that makes the arrest upon that warrant. 2. That admit he may

(*) *Vide Part 1. p. 575 Et supra p. 79.*

arrest, yet he cannot break open a house to take the felon by virtue of that warrant. 3. That admit he may arrest by that warrant, yet he cannot issue a warrant in case only of suspicion. 4. That admit he may, yet no house can be broken by virtue of such warrant.

Touching the *second* and *fourth* matter I shall consider them, when I come to the business of the officer's power in pursuance of a justice's warrant; but touching the power of issuing this warrant by the justices of peace, I shall now consider it: And therein I say as followeth.

1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, tho not yet indicted.

That, upon which the doubt must arise to those that made a doubt of it, must certainly be the statutes of *Magna Charta*, cap. 29. *Nullus liber homo imprisonetur &c. nisi per legale iudicium parium suorum vel per legem terræ.* 25 E. 3. cap. 4. "None shall be taken upon suggestion made to the king or his council, unless it be by presentment or indictment, &c. or by writ original at the common law." 28 E. 3. cap. 3. "No man shall be taken, or imprisoned, or disinherited, or put to death without being brought to answer by due process of law." 42 E. 3. cap. 3. "Whereas upon false accusations people have been brought before the king and council, it is enacted, that no man shall be put to answer without presentment before justices or matter of record, or by due process and writ original according to the old law of the land.

Now all the weight of the question upon these statutes is to see what the law of the land is; for if these preparatory arrests of felons be not against the law of the land, they are not restrained by these statutes. Certainly by the law of the land, if a felony were committed, or but suspected to be committed, a man might be arrested by the party that knows, or upon probable grounds suspects him to be the felon; or by a constable upon complaint, or upon *hue and cry*, and he might be carried to prison, and there detained till delivered by due course of law; and yet this person so arrested not all [109] this while indicted: *vide statutes* 3 E. 1. cap. 9. 4 E. 3. cap. 10. and 5 E. 3. cap. 14. And all this was in order to preserve the peace of the kingdom, and to suppress felons.

But this being not found effectual enough, by the statute of 1 E. 3. cap. 16. for the better keeping and maintaining of the peace commissions

missions are to issue for the same in the several counties; this was their primitive institution. Their power was enlarged by the statute of 18 *E. 3. cap. 2.* to hear and determine felonies and trespasses: and by the statute of 34 *E. 3. cap. 1.* their power is farther enlarged, and particularly their taking as well persons suspected as indicted of felonies mentioned in that act is required, which, tho perchance it refer only to those that have been robbers and gone beyond the sea and since returned, yet it is a pattern for others.

Now by these statutes surely as much power is intended to be translated to the justices of peace in order to the preservation thereof, as was in a constable or private person, for the justices of the peace are conservators of the peace and more.

And let a man look upon all the acts of parliament, that have been down to this day, he shall find that the power of justices of peace to convene and commit felons before indictment is allowed. 4 *E. 3. cap. 2.* Sheriffs shall not let to mainprise such as be indicted or taken by justices of peace, unless mainpernable by law, 1 *R. 3. cap. 3.* and 5 *H. 7. cap. 3.* concerning bailing of prisoners committed upon suspicion, 1 & 2 *P. & M. cap. 13.* 2 & 3 *P. & M. cap. 10.* by which it appears, that justices of peace may commit for felony, yea or for suspicion of felony, 3 *Jac. cap. 10.* 5 *H. 4. cap. 10.* so that the imprisonment before indictment is surely lawful and not within the restraint of *Magna Charta*; and if so, then surely their arrest is much more lawful, for it is but to bring persons to an examination in order to their commitment, bail, or discharge; and there is no greater record of their commitment than of their arrests.

2. He may also issue a warrant to apprehend a person suspected of felony, tho the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because [110] he is a competent judge of the probabilities offered to him of such suspicion.

And as a constable may upon complaint arrest a person suspected of felony, as appears by what hath been said in the foregoing chapters (*), so a justice of peace may do the like by his warrant; and it is also the constant practice accordingly.

But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a

(*) *Vide cap. 10. p. 80. and cap. 11. p. 91. See also Part I. p. 610.*

felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest.

And if there were no other reason to prove it than this, it were sufficient; namely, that the justice of peace may commit him to gaol that is brought before him for such suspicion, or bail him, as appears by the statutes of 1 R. 3. cap. 3. 3 H. 7. cap. 3. 1 & 2 P. & M. cap. 10. and therefore *à fortiori* may make a warrant to convene or bring him before him to examine the cause of the suspicion.

II. As touching the second matter, to whom this warrant is to be directed?

Usually the warrant or precept is directed to the sheriff, or bailiff, constable, or tithingman, and they are bound to execute it; and if they do not, they may be indicted and fined for their neglect.

But it may be directed to any private person or his own servant, 14 H. 8. 16. a. *Crompt. de Pace*, f. 147. b. but he is not bound to execute it; but if he execute it, it is as good as if he were an officer.

If a warrant be directed from a justice of peace to a constable of *D.* to arrest a felon, &c. he is not bound to go out of the vill, where he is constable, to execute the warrant; but yet if he do execute it in another vill, it is good enough, for he acts herein not simply as constable of *D.* but by virtue of the justice's warrant; and so it [111] was ruled in my time at the assizes in *Norfolk* about 1668.

III. As to the third matter, how and in what manner it is to be made or issued? Touching which these things are regularly to be observed.

The party that demands it ought to be examined upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.

The party charging another thus with felony ought to be bound by recognizance to prosecute at the next sessions or assizes, as the case shall require. *Dalt. cap.* 117. p. 334. (a).

The warrant ought to be under the hand and seal of the justice, 2 Co. *Instit.* p. 52. It must have a certain date, but the place, tho it must be alledged in pleading, need not be expressed in the warrant. 14 H. 8. 16. a.

Regularly the warrant ought to contain the cause specially, and should not be generally *to answer such matters as shall be objected*

against him, because it cannot appear, whether it be within the jurisdiction of the justice of peace, neither can it appear whether the party be bailable or not. 2 Co. Inst. p. 52. 591.

And therefore upon such a general warrant returned upon an *habeas corpus*, it is in the pleasure of the court of king's bench to bail or discharge him; and accordingly for this reason, P. 23 Car. B. R. in *Brown's case*, he was discharged.

But yet I hold such a warrant is not therefore void, but if *de facto* the matter be within the jurisdiction of the justice, and so averred, such a general warrant is a good justification especially in case of felony, and antiently it was generally held such general warrants were good in cases of treason or felony (*), tho in warrants of the peace and good behaviour the cause must be shewn, that the party may come provided with his sureties; and accordingly vide *Rastall's Entries*, tit. Attachment 1. *Dalt. cap.* 117. p. 329. (k), *Crompt. de Pace*, f. 148. a. T. 37 Eliz. C. B. *Broughton and Mulhoe (c)*; and accordingly ruled by my lord Coke himself contrary to his [112] opinion in his comment upon *Magna Charta*, T. 7 Jac. C. B. the case of the mayor of *Canterbury*: vide *supra*, Part I. cap. 54. p. 609. *Breach of prison*.

A justice of peace may make his warrant to apprehend a person suspected by name upon a complaint made to him; but where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him this was ruled a void warrant, P. 24 Car. 1. in the case of justice *Swallinor*, and was not a sufficient justification in false imprisonment.

A justice of peace may make a warrant as well in case of felony as of the peace to bring the party *before himself*, and then the officer ought to bring the party before him, that made the warrant, 5 Co. Rep. 59. b. *Foster's case*; or he may make the warrant to bring him *before any of his majesty's justices of the peace*, or *before himself*, or *any of his majesty's justices of the peace*, and then it is in the election of the officer to bring him before which justice of the county he pleases; and it is not in the election of the party to go before whom he pleases; adjudged 5 Co. Rep. 59. b. *Foster's case* against the opinion of *Fineux* 21 H. 7. 21. a.

(*) *Crompt. 233. b. 1 Sid. 78. Dalt. p. 574.* and Sir William *Wentham's case*, Ten. 2 Geo. 1. B. R. *Wise* taken the case of *Kendal* and *Rowe*, State Tr. Vol. IV. p. 861,

862. 5 Mod. Rep. p. 80. 82. 85.

(b) *New Edit. p. 574.*

(c) *Moore, p. 408.*

And in some cases he may make his warrant to bring him to the sessions of the peace, tho it is better to bring him before himself or some justice, that the party may be in the mean time bailed, if there be cause, to appear at the sessions of the peace or gaol-delivery, as the cause shall require.

A warrant of the peace may be to bring the party complained of to the justice, to the intent to find sureties for his appearance at the sessions, &c. and in the mean time to keep the peace, or the warrant may be *si recusaverit*, then to bring him to the common gaol *ibidem moraturus, quousque gratis hoc fecerit*; and yet the constable or officer may bring him in that case before the justice; and if he refuse there to give sureties, he may by virtue of the first warrant bring him to gaol, and commit without any farther warrant or *mittimus*, 5 Co. Rep. 59. b. Foster's case.

[113] The warrant of a justice before indictment may be in the king's name with the *Teste* of the justice, or it may be in the name of the justice of peace himself; the latter most usual; but process after indictment issued from a sessions of the peace is always in the king's name, *Dalt. Justice*, p. 404. 347, 348. (d). But whether generally a justice of peace out of sessions can issue a warrant to apprehend persons offending against a penal law, tho within their cognizance, and so to bind them over to the sessions, or in default thereof to commit them, and this before indictment, seems doubtful: *vide Lamb.* 188, 189. *Dalt. cap.* 117. p. 331. (e). These things seem to make against it. 1. Because some acts of parliament do particularly and expressly authorize them to it, which they would not have done, if it had been otherwise lawful. 2. Because in most cases of this nature, tho the party were indicted, or an information preferred, yet the *capias* was not the first process but a *venire facias* and *distingas*, and in cases of information no process of outlawry at all, 3 H. 6. 9. b. until the statute of 21 Jac. cap 4. gave process of outlawry in actions popular, as in actions of trespass *vi & armis*.

In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther

to abide such order, as to law shall appertain: *vide Dalt. p. 353. (f)*

And this is warrantable by law, and without it felons could not in many cases be discovered, and is the constant practice at this day, notwithstanding the opinion of my lord *Coke* in his jurisdiction of courts, *p. 176.*

But in that case it is convenient, 1. To express that the searches be made in the day-time. 2. That the party suspecting be present to give the officer information of his goods. 3. There can be no breaking open of doors to make the search, but he must enter [114]
per officia aperta, or upon the voluntary opening of the door by the house-keeper or his servants; and the reason is, because the bare having of stolen goods in his house doth not necessarily make a man either a felon or accessary. 4. But because the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found, to come before the justice. 5. The goods being found ought not to be delivered to the party complaining, but to remain in the constable's hand, till either by a writ of restitution upon the conviction of the felony, or by due order of the court they be delivered.

But the general warrant to search all places, whereof the party and officer have suspicion, tho it be usual, yet it is not so safe upon the reason of justice *Swallow's* case before cited; and yet see precedents of such general warrants, *Dalt p. 353, 354.*

The warrant of a justice of peace ought regularly to mention the name of the party to be attached, and must not be left in generals or with blanks to be filled up by the party afterwards. *Dalt. cap. 117. p. 329. (g).* If there be a riot or breach of the peace in the presence of one or more justices, they may arrest the rioters themselves, or command any officers or others by word of mouth without warrant to arrest them, and they may by virtue thereof *flagrante crimine* arrest them in the absence of the justice by the true meaning of the statute of 34 E. 3. cap. 1. and 13 H. 4. cap. 7. *quod vide* adjudged 14 H. 7. 9 & 10.

And therefore if a riot be committed and dispersed by the coming of the justice of peace, and they be suspected probably to meet again or threaten to do so, tho the constables may *ex officio* suppress the riot,

and raise the power of the vill to do it; yet I think it clear, that a justice of peace may deliver a special warrant in the hands of any person to arrest the rioters, if they re-assemble, tho there be no particular persons named in the warrant, because it may be impossible [115] to be known what their names are, and yet the peace is necessary to be kept, as well as the breach of it to be punished; and the justice cannot always personally watch their re-assembling, but must trust others to do it; and this is admitted of all hands in the book of 14 H. 7. 9. and the only doubt is, whether it may be done by word, which yet is adjudged there good.

And thus far for warrants.

IV. The fourth thing is the manner and order of their execution.

If a warrant or precept to arrest a felon come to an officer or other, if the felon be arrested and after arrest escape into another county, yet he may be pursued and taken upon fresh pursuit, and brought before the justice of the county where the warrant issued, for the law adjudgeth him always in the officer's custody by virtue of the first arrest; but if he escapes before arrest into another county, if it be a warrant barely for a misdemeanor, it seems the officer cannot pursue him into another county, because out of the jurisdiction of the justice that granted the warrant; but in case of felony, affray, or dangerous wounding, the officer may pursue him, and raise *hue and cry* upon him into any county, but if he takes him in a foreign county, he is to bring him to the gaol or justice of that county, where he is taken, for he doth not take him purely by the warrant of the justice, but by the authority that the law gives him; and the justice's warrant is a sufficient cause of suspicion and pursuit. 2 E. 4. 6. b. *Dalt. cap.* 118. p. 340. (h), 7 E. 3. 16. b. 11 E. 4. 4. b.

Tho a person, that hath a warrant to arrest for felony or other misdemeanor, may call others to his assistance, yet he cannot make a warrant to another as his deputy to execute it, or command another to execute it in his absence. 8 E. 4. 14. a.

But it is held, that if the warrant be directed to the sheriff, he may make a warrant to his bailiff to execute it, and may command by word his under-sheriff to execute it without any other warrant. 8 E. 4. 14. a. *Dalt. cap.* 117. p. 332. (i).

(b) *New Edit.* p. 24. & 585.

(i) *New Edit.* p. 577.

If a warrant issue from a justice of peace to a private person to arrest for felony or any other matter, he is not bound to shew his warrant, unless it be demanded, and then he must shew it.

But if it be directed to a known officer, as to the sheriff, who is a known officer in the county, or to a constable, who is a known officer in the vill, he is not bound to shew his warrant, tho demanded, no more than a bailiff *jurus & conus*; it is enough for him to say *I arrest you for felony, &c. in the king's name.* 8 E. 4. 14. a. 14 H. 7. 9. b. 21 H. 7. 23. a. 9 Co. Rep. 69. *Mackally's case* (*).

But it is reasonable and also safe for the officer to acquaint him what he attacheth or arresteth him for, for it is a great security to the officer that arrests him, and just for the party arrested to know the cause for what it is.

A warrant of a justice of peace to arrest for felony may be executed in a franchise within the county, for it is the king's suit, in which a *non omittas* is virtually included.

Where by virtue of a warrant from a justice of peace the house may be broken to apprehend a felon or other malefactor, there are these diversities.

Upon a warrant to search for stolen goods the doors cannot be broken open; for tho it be for the king, yet the law enables not the breaking of houses in all cases for the king: (*vide* statute 12 Car. 2. cap. 19. a special act to enable the search and breaking open of an house in case of goods uncustomed) and therefore the entry to search by such a warrant must be *per ostia aperta*.

So upon an *excommunicato capiendo*, tho it be the king's suit, yet doors cannot be broken to take him. *H. 42 Eliz. C. B. Croke, n. 17. Smith and Smith (k).*

If a justice of peace issues a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the [117] officer may break open the door to take him; and the same law is, if it be but for suspicion of felony. 13 E. 4. 9. a. 5 Co. Rep. 91. b. *Semain's case* (†).

(*) This was an arrest in a civil action, and the warrant there meant was not the writ or warrant for arresting the party, but the general warrant constituting him bailiff, and of this are the cases in the year-books here cited to be understood; tho it may be

otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. *Vide Part 1. p. 458 in notis.*

(k) *Cro. Eliz. 741.*

(†) *Part 1. p. 582.*

And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. 5 *Co. Rep.* 93. *a. Semain's case*. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is; but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem*.

But in case of warrants to search for stolen goods I think the doors of any person cannot be broken up.

If a warrant of the peace issue from a justice of peace, the officer or minister of such warrant may break open a door in case of refusal to open after demand and notice of his business: ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78. *p.* 204, 205. (1).

Now touching the killing of a man *justiciari se nolentis*, where there is a lawful warrant against him, much hath been said before; where I considered the constable's power (*); somewhat I shall say here.

It is necessary in this case to consider the difference between an arrest upon a warrant for felony, and an arrest for a simple misdemeanor.

And also a difference if the officer kills him in case of a flight, or of a resistance and an attempt of a rescue after arrest.

If there be a warrant against *A.* for a trespass or breach of the peace, and *A.* flies and will not yield to the arrest, or being taken makes his escape, the minister kills him, this is murder.

But if *A.* either upon the attempt to arrest, or after the arrest assault the minister, that hath the warrant to arrest him, to the intent to make his escape from him, and the minister standing upon his guard kills him, this is no felony, for being by law authorized to arrest him, he is not bound to go back to the wall, as in common cases of *se defendendo*, for the law is his protection. And therefore as on the one side if *A.* kills him, it is murder, so on the other side if upon this assault by *A.* the minister kills him, it is no felony; the necessity excuseth him, if he cannot otherwise save himself and perform his duty.

And herein it agrees with the common case of a sheriff's bailiff in the execution of his warrant. *Co. P. C. cap.* 8. *p.* 56.

(1) *New Edit. cap.* 127. *p.* 427.

(*) *Supra, p.* 91 & 77. *Part I. p.* 489.

But where a warrant issueth against a felon, and either before arrest or after he flies and defends himself with stones, as the book of 3 E. 3. *Coron.* 290. or with his bow and arrows, as the record is of *M. 22 E. 3. Rot.* 117. *coram rege Ebor (m)*, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kills him, it is no felony; and the same law is for a constable, that doth it *virtute officii*, or upon a pursuit of *hue and cry*.

And the same law it is, if in truth he were no felon, but yet a warrant is against him as suspect of felony, and he having notice thereof flies and resists, for the officer or minister ought to pursue his warrant, or otherwise he is punishable; and the party by his flight and resistance is accessory to his own death.

But then there must be these cautions. 1. He must be a lawful officer, or there must be a *hue and cry*, or there must be a lawful warrant. 2. That the party ought to have notice of the reason of the pursuit, namely because a warrant is against him, for his flight must be upon notice to him of the intent to arrest him for felony. 2 E. 4. 9. a. And 3. It must be a case of necessity, and that not such a necessity as in the former case, where an immediate [119] assault is made upon the minister just at his coming to arrest, or to rescue himself from him; but this is the necessity, *viz.* that he cannot otherwise be taken, and the reason is, because it is for the public good, and they are punishable, if they neglect in any manner what they ought to do, namely the minister by fine and imprisonment, and the township by an amercement.

But tho a private person may arrest a felon, and if he flies so as he cannot be taken without he be kild, it is excusable in this case for the necessity, 22 *Affix.* 55. *per Thorp*, yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at least before the arrest, seems at least manslaughter for the reason above

(m) This was the case of Henry Vesey, who had been indicted before the sheriff in Turno *jur* anno R. R. nonis divers felonies, whereupon the sheriff *mandavit* commissionem suam Henrico de Clyderawe & aliis ad capiendum prædictum H. Vesey & saltem ducendum eque castrum de Ebor. Vesey would not submit to an arrest, but fled, & inter fugiendam shot with his bow and arrows at his pursuers, but in the end was kild by Clyderawe. Clyderawe was

afterwards indicted, "quod felonie interfecit prædictum H. Vesey, sed quia compertum est, quod prædictus H. de Clyderawe prædictum H. Vesey interfectum de diversis felonis fugam hincendo, ut felonem domini regis, etiam commissione sue prædictæ anno R. nono interfecit & non felonem; condematam est, quod idem H. de Clyderawe eam inde quietus."

given, for an innocent person is not bound to take notice of a private person's suspicion (*).

If a justice of peace have jurisdiction in the case, (as he hath in all felonies and breaches of the peace, yea tho it be high-treason, so far forth as it is a breach of the peace) tho he errs in granting of his warrant, it seems that the officer that executes it, is excusable. 14 *H.* 8. 16. *a. per curiam.*

Yet in some cases, as touching rates for the poor, tho he hath jurisdiction in the matter by the statute of 43 *Eliz. cap. 2.* the officer is punishable for executing the warrant, where none ought to issue, because it is a circumscribed particular jurisdiction given him by act of parliament, which he ought strictly to pursue. *T. 10 Car. B. R. 2 Rol. Abr. 560. Nichols and Walker.*

When the officer or minister hath made his arrest, he is forthwith to bring the party to the gaol, or to the justice, according to the import of the warrant.

But if the time be unseasonable as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick and not able at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the
[120] quality of the person or the indisposition so require, secure him in a house till the next day, or such time as it may be reasonable to bring him. 2 *E.* 4. 9 & 10. (+).

When he hath brought him to the justice, yet he is in law still in his custody, till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice. 10 *H.* 4. 7. *a. Escape* 8.

And thus far concerning arrests by warrant or precept.

See Burn. tit. Arrest. Index to 2 Hawk. P. C. tit. Arrest. 4 Blackf. Comr ch. 21. Of Arrests. pa. 289. &c. See 2 Wilson 288. Entick v. Carrington touching General Warrants.

(*) *Vide supra*, p. 83.

(+) *Vide supra*, p. 95, 96.

C H A P. XIV.

Concerning the office of a justice, when a person charged or suspected of felony is brought before him.

WHEN a party thus arrested for felony is brought to the justice of peace, he must either discharge, or commit, or bail him.

But preparatory to these acts there are some things, that are required of him before he do either.

1. By the statute of 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10. he is to take the informations upon oath of the prosecutor and witnesses and put them into writing; and he is likewise to take the examination of the person accused, but this is to be without oath and put into writing.

And these examinations and informations he is afterwards to deliver into the general sessions of the peace or to the gaol-delivery, as the case shall require; and because it may be unreasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the examinations can be taken.

But this must be dispatched in some convenient time, and therefore, *P. 43 Eliz. C. B. Scavage and Tatcham (a)*, in [121] an action of false imprisonment brought by a person brought before the mayor of *Pomfret*, a justice of peace, upon suspicion of felony, the defendant could not upon the account of examination justify the detaining him in the justice's house nineteen days; but it was held, that he might detain him three days upon that account.

2. It is fit to take a recognizance from the prosecutor to appear and prefer a bill of indictment, and also of the witnesses to appear and give evidence at the next sessions of the peace or gaol-delivery, as the case shall require, if he shall find cause to commit or bail the prisoner; otherwise it is, if he shall discharge him.

These things being thus premised, as I said, the prisoner is either to be discharged, or committed, or bailed.

(a) *Cro. Eliz.* 829. *Vide Part I. p. 535.*

I. Touching the discharge of a prisoner. If a prisoner be brought before a justice of peace expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him.

If he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice of peace may discharge him, as if a man be charged with felony for stealing of a parcel of the freehold, or for carrying away what was delivered him, and such like, for which tho there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony, *Kelw. f. 34. 44 Affiz. 12. Poulton de Pace 146. b.* But if a man be kild by another, tho it be *per infortunium* or *se defendendo*, (which is not properly felony,) or in making an assault upon a minister of justice in execution of his office, (which is not at all felony,) yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed.

[122] II. As touching commitment or imprisonment of a party brought before a justice for felony, or suspicion thereof, these things are to be observed:

1. The commitment must be by writing under the seal of the justice.

And therefore altho a justice may by word of mouth arrest a person for a breach of the peace done in his presence, yet in that case the commitment of him ought to be a *mittimus* under seal; thus it was resolved in *Sandford's case* (*), *P. 23 Car. 1. B. R.* but agreed he may detain him in his custody, till a warrant can be made.

And herein the power of a justice differs from the power of a court; for the court of king's bench may commit by order, and so may the court of sessions of the peace, because there is or ought to be a record of the commitment.

Nay in chancery, if an order be made for commitment of a person, till he enter into bond, &c. the warden of the *Fleet* may justify the imprisonment by virtue of that order. *T. 39 Eliz. B. R. 2 Rol. Abr. p. 559. Taylor and Beal.*

(*) *Part I. p. 612.*

2. The *mittimus* ought to have these circumstances. 1. It must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally *pro feloniam*, but it must contain the especial nature of the felony briefly, as *for felony for the death of J. S.* or *for burglary in breaking the house of J. S. &c.* and the reason is, because it may appear to the judges of the king's bench upon an *habeas corpus*, whether it be felony or not (+): and likewise by the statute of 3 H. 7. cap. 3. the sheriff is to make a calendar of the prisoners in his gaol, and deliver it to the justice of gaol-delivery signifying the prisoners and their causes: *vide 2 Co. Instit.* 52 & 591. 2. It is fit to mention the name of the justice, and his authority in the beginning of the *mittimus*, tho this is not always necessary, for the seal and subscription of the justice to the *mittimus* is sufficient warrant to the gaoler: *vide supra* (**) & *Dalt.* 355 & 383. (b), for it may be supplied by averment, that it was done by the justice. 3. It must have a certain date of the year and day (*). 4. It should have an apt conclusion, namely to detain him till he be thence [123] delivered by due course of law. *2 Co. Instit. ubi supra* (+).

But altho it be true, that these things are regular and fit, namely the cause, the justice committing, the date, the apt conclusion, yet I am far from thinking the warrant void, that hath not all these circumstances.

And therefore the justification in false imprisonment against the gaoler may be good by virtue of such a warrant; and it seems to me, (contrary to the opinion of my lord *Coke, ubi supra,*) that if an escape be suffered willingly by the gaoler upon such a general warrant, it will be felony in him: *vide quæ supra, cap. 54. Part I. p. 609. De frangentibus prisonam (c).*

And therefore if the conclusion of the *mittimus* be to detain him till further order by the justice, it is true it is an unapt conclusion, and therefore binds not up the hands of the justices, to whom it may belong, to bail or deliver him, as the case shall require; but the commitment is notwithstanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, tho the particular is best to be expressed.

(+) *Vide supra, p. 111.*

(**) *Part I. p. 577.*

(b) *New Edit. p. 575 & 593.*

(*) *Supra, p. 111.*

(+) *Vide Part I. p. 584.*

(c) *See also Part. I. p. 595.*

3. Regularly the commitment is to be to the common gaol of the county, or if the offense be committed and the party taken within a franchise that hath a gaol, (as the *Gatchouse* at *Westminster*,) then to the gaol of the franchise, by the statute of 5 H. 4. cap. 10.

Only sometimes it hath been used by the justices of peace to send such prisoners, which are bailable and have not their bail ready, to some private prison, as the *New Prison* in *Middlesex* for some short time, till they can procure their bail: but this hath always been disliked by the justices of the king's bench and gaol-delivery as inconvenient, and not agreeable to the law (*d*).

4. If the prisoner be bailable yet the justice is not bound to demand bail, but the prisoner is bound to tender it, otherwise the justice may commit him; *quod vide* 14 H. 7. 10. a. per [124] *Fineux*, accordingly adjudged *T. 40 Eliz. C. B. Collin's* case; and so of a sheriff, that hath taken a man by *capias*, where he is bailable.

Thus far touching commitment of an offender.

But in some cases the offender is neither discharged nor committed, but bailed, and that comes next to be considered.

But because the business of bail is large and various, I shall refer that to the next chapter.

Burn. Title Justices of the Peace.

(*d*) See the case of *Kendal and Roc*, *State Tr. Vol. IV. p. 862.* & *supra*, Part I. p. 585. in *notis*.

C H A P. XV.

Concerning bail and mainprise.

TOUCHING bailing of felons, &c. there will be these things inquirable. 1. What it is, and the nature and kinds of it. 2. In what cases it may be, and in what not. 3. By whom (*a*). 4. In what manner it is to be done, by writ or without writ (*b*). 5. The penalty of erring therein (*c*).

(*a*) *Infra*, cap. 16. & *sub fine* cap. 17.

(*b*) *Infra*, cap. 17.

(*c*) *Infra*, *sub fine* *hujus capituli*.

Touching

Touching the *first*, namely the nature of bail.

Bail and mainprife are used promiscuously oftentimes for the same thing, and indeed the words import much the same thing, for the former is *traditus J. S.* and the other is *manucaptus per J. S.*

But yet in a proper and legal sense they differ. 1. Always mainprife is a recognizance in the sum certain, but bail is not always so. 2. He, that is deliverd *per manucaptionem* only, is out of custody; but he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in; and therefore if a man be let to mainprife, suppose in the king's bench, an appeal or other suit cannot be brought against him as in *custodi marescalli*; but if he be let to bail, he is in supposition of law still in *custodi marescalli*, 33 E. 3. Mainprife 12. 36 E. 3. *Ibidem* 13. 32 H. 6. 4. a. Protection 13. and accordingly the books of 21 H. 7. 20. b. *per Fincus*, and [125] 9 E. 4. 2. a. that seem to differ, are to be understood. 3. Tho sometimes the recognizances themselves both in bail and mainprife are in sums certain, as shall be shewn, yet the entry on record in the one case is *deliberatur per manucaptionem*, and in the other case *traditur in ballium*.

But now for the kinds of bail properly so called, it is of these kinds.

1. Sometimes it is in no sum certain at all, but *traditur in ballium* to J. S. and this is the usual form in all bails in civil actions in the king's bench; and antiently it was so also in criminal cases, tho now, as shall be shewn, it differs.

And of this kind was the antient form of that bail, which was *corpus pro corpore*, which now is rarely used in that form, and the reason why that is disused is, because there was antiently a loose opinion, that he, who was bail in this manner for a felon, was to be hanged, if he brought not in the principal to keep his day, 33 E. 3. Mainprife 12. but the truth is, all his punishment is to be fined for his default. *Crompt. Justice. f. 157. a. 11 H. 6. 31. b.*

And so in civil actions, where this kind of bail is sometimes in use, as appears 27 H. 8. 11 & 12. 21 H. 7. 20. b. the bail is amerced, if he have not the principal at the day.

2. Sometimes the bail is only a recognizance in a sum certain for the appearance of a felon, and this is usual, viz. the principal in double the sum; as for instance in 40*l.* or more, the sureties each of

of them in 20l. a-piece *ad comparendum & standum recto in curiâ de latrocinio prædicto secundum legem, &c. Dalt. cap. 114. p. 305. (a).*

The sureties ought to be at least two men of ability, and their number and sufficiency and the sum of the recognizance is much in the discretion of him that is to take it, and therefore he may examine them upon oath; but how these are punishable that take insufficient bail, shall be said hereafter.

[126] The sureties *ad standum juri* doth import also, that he shall plead to the felony; and therefore before the statute of *Marlbridge, cap. 28. (b)*, if the felon had stood upon his *privilegium clericale* and would not answer the felony, his bail had been amerced, which is remedied by that statute.

3. The third sort of bail is that, which is indeed the true and regular bail, which is not only a recognizance in a sum certain, but also a taking to bail, the true form whereof is contained in *Lambert's Justice, Lib. I. cap. 23. p. 264. Memorand' quod die, anno, &c. coram, &c. venerunt A. & B. & ceperunt in ballium J. S. captum & detentum pro suspitione cujusdam felonie usque proximam generalem gaolæ deliberationem in comitatu prædicto tenend', & assumpserunt, viz. quilibet eorum sub pœna 20l. de bonis & catallis, terris & tenementis eorum & cujuslibet eorum ad opus dicti domini regis levand', si prædictus J. S. ad eandem proximam gaolæ deliberationem non personaliter comparebit coram justiciariis dicti domini regis ad dictam gaolam deliberand' assignatis ad respondendum dicto domino regi tunc & ibidem super præmissis, or super iis, quæ ad tunc & ibidem ipsi objicientur, or* rather according to the antient form *ad standum recto de latrocinio prædicto secundum legem & consuetudinem regni Angliæ. Dat. sub sigillis nostris, die, anno, &c. Vide F. N. B. 250. Crompt. 157. b.*

But the seal need not be, for he is a judge of record, only his hand simply subscribed, or subscribed *capt. & cognitus die & anno supra dicto coram Math. Hale.*

This is the form of a bail, where the principal is either an infant or in prison, and so absent; and thereupon a warrant issues under the hand and seal of him that takes the bail for his enlargement, called a *liberate*.

But if he be bailed by a justice of peace before commitment, or if committed and brought into the court of king's bench or sessions to

(a) *New Edit. cap. 166. p. 150.*

(b) *2 Co. Inst. p. 150.*

be bailed, then the party himself is also bound; and sometimes the recognizance is simple with a condition added for his appearance, and sometimes the condition is contained in the body of the recognizance, *ut supra*: Only it is to be remembered, that when any person is bailed for any misdemeanor either upon the return of an *habeas corpus* or otherwise, the return or record ought to be [127] first filed, and a *committitur marescalli* entered, and then bail taken; for all persons, that are bailed in the king's bench, are *de facto*, or in supposition of law first supposed to be *in custodia marescalli*.

The advantage of this kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause, and may re-seize the prisoner, if they doubt his escape, and bring him before the justice or court, and he shall be committed, and so the bail be discharged of his recognizance. 36 E. 3. *Mainprise* 13. 32 E. 3. *Mainprise* 23. *Crompt. Justice*, f. 157. a.

Touching the *second*, in what cases a person is bailable, that is accused or indicted of felony or accessory, or in relation thereunto.

I shall not meddle with bailing of prisoners in civil actions or for offenses less than felony by acts of parliament, only thus much.

Regularly in all offenses either against the common law or acts of parliament, that are below felony, the offender is bailable, unless,
1. He hath had judgment. 2. Or that by some particular or special act of parliament bail is ousted.

What acts of parliament oust bail in particular offenses against those acts is not my purpose to declare, they are very well collected by Mr. *Dalton*, cap. 114. (c), and Mr. *Crompton de pace regis*, f. 154. b. & *sequentibus*.

In relation to capital offenses there are especially these acts of parliament, that are the common land-marks touching offenses bailable or not bailable, *viz.* 3 E. 1. or *Westm.* 1. cap. 15. 34 E. 3. cap. 1. 23 H. 6. cap. 10. 1 R. 3. cap. 3. 3 H. 7. cap. 3. 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10.

As to the statute of 3 E. 1. it declares, who are bailable and who not as well in other cases, as in cases capital.

But at that time few were concerned in bailing of prisoners, but the sheriff, in whose custody they most commonly were, and such subordinate officers, that either under the sheriff or as bailiffs of liberties had the custody of prisoners, [as appears from the words of the statute,] *Et par ceo que viscounts & autres queux ont prise & retenus prisoners*: And therefore still the statute did not extend to courts of justice, much less to the court of king's bench: *vide 2 Co. Instit. p. 185, 186. super hoc statutum*; neither doth this statute singly of itself extend to justices of the peace, for they were not in being till 1 E. 3. and therefore the statute of 1 & 2 P. & M. cap. 13. especially makes this statute of 3 E. 1. a direction touching bailing of offenders.

And therefore it seems also upon the same reason the statute of 27 E. 1. cap. 3. *de finibus levatis*, that directs and authorizeth justices of gaol-delivery to inquire of sheriffs and others, that have let out of prison by replevying persons not replevifable, or have offended against the statute of *Westminster*, and to punish them according to that statute, extends not to courts or justices of the peace, but only to sheriffs and subordinate officers.

And the truth is, it could not be well applicable to any but them, for as all writs of *homine replegiando*, *de manucaptione*, & *de odio & atia* were directed to the sheriffs, so in most cases what was to be done in those times for bailing of prisoners was most commonly to be done by the sheriff.

This statute declares, 1. Who were not bailable by the common law. 2. Who from thenceforth should not be bailable; and 3. Who should be bailable, and inflicts punishment upon sheriffs and bailiffs bailing those that are not replevifable, and not bailing those that are replevifable.

And this act extends not only to such bailments as might be *virtute officii*, but also to bailments by force of the common writ *de homine replegiando* or *de manucaptione*; whereof hereafter.

My lord Coke in his comment upon this chapter (*d*) hath given us the substance and intent of this statute, which I shall therefore but in effect transcribe.

[129] I. As to those that were irreplevifable at common law, I mean before the statute of 3 E. 1. (for possibly more antiently all offenders were replevifable), they are of four sorts.

1. *For the death of a man.*

(*d*) 2 Co. Instit. p. 186, & seq.

At

At this time there was held little difference between murder and manslaughter, but only in degree; for till 23 H. 3. clergy was allowable in the one as well as in the other, nay, at this day, if the indictment run only *intusfecit & murtheravit* without *ex malicia præcogitata*, the prisoner hath clergy.

And as to the point of *bail* no difference was at common law, nor after the statute of 3 E. 1. till later statutes (*de quibus infra*), between murder, manslaughter, or the killing of a man *se defendendo*, or *per infortunium*, for they, that could not bail in murder, regularly could not bail in the other three cases.

And this held universally as to bailment by the sheriff or by the justices of peace; but as to others, it had some exceptions.

The court of king's bench might and still may bail in any case whatsoever, even in high treason or murder, for the court is held in law *coram ipso rege*. 4 Co. *Instit.* p. 71. 2 Co. *Instit.* p. 186. but this is in the discretion of the court, and none can challenge it *de jure*.

And this bailment in the king's bench may be upon an original indictment before them in the county where they sit, or upon an indictment removed by *certiorari*, or upon a prisoner removed by *habeas corpus* before or after an indictment taken; *vide infra*.

In some cases justices of gaol-delivery may bail in case of the death of a man.

1. If a man be found guilty of a death *se defendendo*, or *per infortunium* upon his trial, the justices of gaol-delivery may certify the matter into *chancery*, that the party may sue his pardon of course, and in the mean time bail him till the next sessions. 3 E. 3. *Coron.* 361.

And the same law it is, if the coroner's inquest only find it *se defendendo*, such inquisition shewing the special matter, as [130] it ought, is good, *Stamf. P. C. cap.* 7. *f.* 15. *b.* 26 *Eliz.* *Holmes's* case, *Crompt. de pace*, *f.* 153. *b.* & 28. *a.* and the reason of the book of 12 E. 3. cited by *Crompton*, that in an indictment before the coroner *se defendendo*, the words *se defendendo* were void and stricken out, is not because they were against the king, but because they were too general.

2 Co. *Instit. super stat. Glouc. cap.* 9. p. 316. an indictment *se defendendo* is good before justices of gaol-delivery, but it is there said it is not good before justices of peace; *de quo supra*, p. 45. and therefore upon such an indictment before the coroner *se defendendo* specially, the justices of gaol-delivery may bail the party till the next sessions to

procure his pardon of course, as well as if it had been found upon his trial; and so it was done 26 *Eliz.* in *Holmes's* case, *Crompt.* 153. *b.* vide *Ap-Rice's* case, 19 *H.* 7. *Ketw.* 53. *a.* *Crompt.* *ibidem.*

2. If a man be convicted of manslaughter, and hath a pardon to plead, which the justices of gaol-delivery see in the interval of the session they may bail him, (notwithstanding his conviction and that of manslaughter), to another session to plead his pardon. 2 *E.* 6. *B.* *Mansp. se* 94. *Crompt.* 153 *b.*

3. If a person be brought before the judges of gaol-delivery upon suspicion of murder, but before commitment or indictment [it appears] upon examination of the fact by the justices of gaol-delivery, that he is not guilty, (tho in truth a felony were committed), the justices of gaol-delivery may bail him to another sessions: vide 31 *Eliz.* in case *de Saljord*, *Crompt.* 154. *a.*

But I am not of the mind that the same judge [*Shuttleworth*] was of that if he be convicted upon a trial against the opinion of the judge, that he can bail him to sue his pardon; but all he may do is to reprieve him before judgment, and certify for him for a pardon.

And therefore it seems to me there is no difference between this [131] case and that of *Dyer* 179. *a.* where a man is convicted, and it is doubted whether he be within clergy, yet he remaineth notailable.

4. If a man be indicted of murder at the sessions of gaol-delivery, and prays his trial, but the prosecutor for the king is not ready with all his evidence, the judge may respite his trial till another sessions; and tho he be not bound to bail him, yet if he do find that it is no contrivance of the prisoner to surprise the prosecutor, but that it is merely the neglect of the prosecutor, or that his pretense is merely a delay to continue the party in prison, I have known it often practised at *Newgate*, and elsewhere, for the justices of gaol-delivery to bail the prisoner till another sessions, if it be far off, and upon circumstances considered.

And yet in none of these cases neither justices of peace nor sheriff can bail; but how far they may bail in cases of manslaughter shall be said hereafter, when we consider the subsequent statutes.

And thus far at present for bailing in case of the death of a man.

2. The *second* case where a man was notailable by the common law, is, where a man is taken *per mandatum domini regis*: this is not intended of the personal command of the king, for regularly as the king

king cannot in person arrest or imprison, so he cannot command another to imprison, but it must be done by some order, writ, or precept, or process of some of his courts. 16 H. 6. *Monstrans de fait* 182. 1 H. 7. 4. b. 2 Co. *Instit. super statutum Westm.* 1 cap. 15. p. 187.

Nay, altho such a mandate be by commission under the great seal, it is void, 42 Affiz. 5. therefore the *præceptum*, or *mandatum domini regis* in this act, is intended of the process of law issuing out of the king's courts according to their several jurisdictions, 2 Co. *Instit. super Mag. Chart.* cap. 29. and *Westm.* 1. cap. 15. But if intended of the king's personal command, tho such a person so taken be not bailable by the common writ *de homine replegiando*, yet he is bailable by the court of king's bench or chancery upon an *habeas corpus*; *de quo infra*, 2 Co. *Instit.* p. 55. 187.

3. Thirdly, *Or of the justices*, viz. by writ of process issuing according to law within their several jurisdictions; [132] for altho these were bailable in many cases by the courts that issued the process, yet they were not bailable by the common writ *de homine replegiando*, but are excepted therein, nor by the sheriff *virtute officii* till the statute of 23 H. 6. cap. 10.

4. Fourthly, *Or for the Forest*; persons imprisoned by the justice in eyre in the forest, are not repleviable by the common writ *de homine replegiando*.

II. The second part of this statute is enacting or declarative who are not bailable; but so far as this statute looks, it only concerns the sheriff and bailiffs, and the common writs of *homine replegiando*, or *de manucapione*, which are directed to the sheriff, tho afterwards it was made the rule in many things to justices of peace, &c. by the statutes of 1 & 2 P. & M. and 2 & 3 P. & M. *de quibus infra*.

And the cases wherein bail is restrained by this statute, are thirteen in number, some in respect of the heinousness and weight of the offense, as treason, burning of houses, breaking of prison, &c. and the rest upon the great evidence and probability of guilt, as persons outlawed, &c. but I shall follow them in the order that the statute sets them down.

1. Persons outlawed; for outlawry is an attainder of felony, and [the outlaw] is presumed guilty, because he withdraws himself from the process of law.

And upon the same reason, that a person convicted of felony, while the judge advoketh upon his clergy, is not bailable, because he is

convicted, *Dy.* 179. *a.* Nay, tho he be convicted against the direction of the court, he is notailable against the opinion of *Shuttleworth*, 21 *Eliz. Crompt. f.* 154. *a.*

And therefore if the ordinary had had a clerk convicted in his custody, if the ordinary let him to bail, he was punishable: *vide* 15 *H.* 7. 9. *a.*

But if a man be outlawed for felony, and be taken upon a *capias utlegatum*, and plead in avoidance of the outlawry against him that he is of another place, and so not the person outlawed, or bring a writ of error to reverse the outlawry and assign his errors, the court [133] of king's bench may bail him; and it is not unusual so to do, whether the outlawry be upon an appeal or an indictment.

If a man be indicted or appealed for such an offence, wherein bail may be taken, the indictment or appeal does not hinder his bailment, because it induceth no sufficient presumption of his guilt; if he wereailable before indictment, he isailable after, 2 *Co. Instit. super stat. Westm.* 1. cap. 15. and *statutum ipsum F. N. B.* 249. 22 *Affiz.* 94. but not allowed till he hath pleaded to the indictment, 16 *Affiz.* 13. 29 *Affiz.* 44.

But if a man be indicted before justices of a higher jurisdiction, as before justices of *oyer and terminer*, he cannot be bailed by justices of peace, for they cannot proceed upon an indictment taken before superior judges, tho otherwise the cause might be within their cognizance.

2. Persons that have abjured for felony, are notailable, for they are attainted in law.

3. Approvers in felony are notailable, because they do confess themselves guilty.

4. Persons taken with the *mainowre* are notailable, because it is *furtum manifestum*.

But that is intended of the thief himself; for if *A.* steal goods, and sells them to *B.* and *B.* is taken with them, *B.* isailable.

5. Persons that being committed for felony break prison, are not to be bailed; for, 1. It carries a presumption of their guilt. 2. It is a superadded felony to the former, for which they stood committed.

6. Notorious thieves: and herein common fame, and other circumstances may be opposed against their bailing, unless they can shew reasonable evidence to prove their innocence. 16 *E.* 4. 5. *a. b.*

7. Persons impeached and approved by an approver, because it induceth a strong suspicion that they are guilty, because the accuser confesseth himself guilty before he can impeach others. But

But this hath certain exceptions. 1. If the approver be dead. 2. If the approver hath waved his appeal. 3. If the person accused by the approver be of good fame.

8. Persons arrested for wilful burning of another man's house, which was a felony at common law.

9. Persons arrested for falsifying the king's coin.

10. Or for counterfeiting the king's great or privy seal.

11. He that is excommunicated by the ordinary, is not bailable, unless it be for a temporal cause; and then upon a prohibition granted, he may not only be bailed but delivered; or upon an appeal and a special writ *de cautione admittenda*, if not obeyed by the ordinary, a special writ may issue for his enlargement.

12. Or if he be imprisoned for some open misdeed, as if *A.* dangerously wounds *B.* he may be imprisoned till it be known whether the party will die or live; and regularly is not to be bailed, till it shall probably appear that the danger is over. 10 *H.* 7. 20. *a.* 3. *H.* 7. *cap.* 1.

13. Nor he that is arrested for treason, that toucheth the king, whether he be indicted or not; these are neither bailable by virtue of the common writ *de homine replegiando*, nor *ex officio* by the sheriff or bailiff of a liberty.

But all or any of these are bailable by the court of king's bench. 2 *Co. Inst.* 189.

III. The third thing provided by this statute, is to declare who are bailable by the sheriff, and they are of seven kinds.

1. Persons indicted before the sheriff for larceny, if they have not been accused of other felonies before, or as the writ of the register, *f.* 83. *b.* 268. *b.* styles them, if they are of good fame.

This therefore lies very much in the discretion and true information of the sheriff, or other justices that commit them.

2. Persons imprisoned for a light suspicion, *dum tamen fuerint bonæ famæ.*

3. Persons indicted for petit larceny.

4. Persons accused for receiving of felons.

5. Or of commandment, force, or aid to the felony done.

These two last concern accessaries *after* and *before*, where-
in there is some diversity of opinion in our books. [135]

Regularly in all cases of felony, tho it be murder, the accessary is bailable till the principal be attaint, and this holds as well in cases of

the death of a man as other felonies, 40 *E. 3.* 42. *a.* 40 *Affiz.* 8. But if the principal be once attaind, and then the accessary is taken, he shall not be bailed until he hath pleaded to the indictment; but after plea pleaded by him, he shall be bailed, notwithstanding the attainder of the principal, tho it be in case of murder. 43 *E. 3.* 17. *b.* 50 *E. 3.* 15. *a.* 27 *Affiz.* 10. 47 *Affiz.* 16.

6. Or indicted or accused for an offense, for which he ought not to lose life or member, unless in cases of offenses against acts of parliament, where the acts of parliament exclude bail.

7. Or appeal'd by an approver, who is since dead.

These be the cases wherein by *that* act the party is bailable.

And therefore though a party be committed, and the tenor of the *mittimus* be to detain him without bail or mainprise, yet if the offense be by law bailable, he that hath the power of bailing may bail him. *Crompt. de Pace* 153. *a.*

This statute adds a penalty, 1. For bailing a person not bailable; if he be a sheriff, constable, or bailiff of fee, he shall lose his office; and if he be an under-bailiff, or not a bailiff of fee, he shall have three years imprisonment, and be fined at the king's pleasure. 2. And if he shall detain persons repleviable after surety offered, he shall be grievously amerced.

And thus far for the statute of 3 *E. 1.*

Burn. Tit. Bail per totum. Index to 2 Hawk. P.C. Tit. Bail. 4 Blackf. Com. ch. 22. Of Commitment and Bail, 296—300.

Concerning the statutes of 34 *E. 3.* 1 *R. 3.* 3 *H. 7.* 1 & 2 *P. & M.* 2 & 3 *P. & M.* *in relation to* bailment of prisoners.

ANTIENTLY most of the business touching bailment of prisoners for felony or misdemeanors was performed by the sheriff or special bailiffs of liberties, either by writ, or *virtute officii*.

But when the offices of justices of peace were instituted by the statute of 1 *E. 3.* they gradually had the greater business of committing and bailing offenders devolved into their hands; and by successive acts of parliament.

1. The power of the sheriff grew out of use. 2. The justices of peace obtained most of the sheriff's power in relation to bailment. 3. Their power of bailment is in relation to offenses extended larger than the sheriff's, and in some kind larger than the limits prescribed by 3 E. 1. 4. Yet in some respects the sheriff's power as to bailing in offenses not capital was enlarged by the statute of 23 H. 6. cap. 10.

I shall therefore take these several statutes in order of time.

I. The statute of 34 E. 3. cap. 1. gave them power to apprehend malefactors, and to commit them to custody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, *v. z.* to appear at such a day at their sessions, and in the mean time to be of good behaviour.

By the statute of 23 H. 6. cap. 10. there is not only power, but command to the sheriff to let out by sufficient sureties parties arrested in personal actions, and upon indictments of trespass, (except persons taken by *excommunicatio capiendæ*, condemnation, judgment, execution, surety of the peace, or by commandment of the justices, or persons taken upon the statute of labourers), yet [137] their power of bailing of felons, &c. by the statute of 3 E. 1. continued.

II. By the statute of 1 R. 3. cap. 3. "Forasmuch as persons have been taken and imprisoned upon suspicion of felony, sometimes upon light suspicions, sometimes by malice, and detained without bail or mainprize, it is enacted, that every justice of peace within their limits have power to let such prisoners to bail, as if they had been indicted before them at their sessions, and shall have power to inquire of escapes."

This gave power to any one justice of peace to bail any prisoner for felony, and excepts not manslaughter, but withal supposes, that before this act they could not bail till indictment in their sessions; but it seems was somewhat uncertain, for it was, *where they were committed for malice or light suspicions.*

III. The statute of 3 H. 7. cap. 3. reciting the statute of 1 R. 3. and that by colour thereof divers persons not mainpernable were let to bail, enacts, "That two justices of the peace, whereof one of the *quorum*, have power to let such persons as are mainpernable by law, to bail to the next sessions of the peace or trial-delivery, and shall accordingly return the recognizance under pain of 10*l.*

This statute seems, 1. To repeal the statute of 1 *R.* 3. as to bailing by one justice, and gives it to two justices, whereof one of the *quorum*. 2. It limits also the power of bailment only to such cases as are bailable by law; and therefore, it seems, takes in the statute of 3 *E.* 1. as the directory what persons are by law bailable. And thus it stood till 1 *Mar.*

IV. By the statute of 1 & 2 *P. & M.* cap. 13. these two things are principally enacted.

1. That whereas the statute of 3 *H.* 7. is general, that two justices, shall let to bail such as are bailable by law, this statute in express words makes the statute of 3 *E.* 1. the standard for the taking of bail by two justices.

[138] 2. That any person arrested for manslaughter, or other felony bailable by law, or suspicion thereof, shall not be bailed but by two justices of peace, whereof one of the *quorum*, both to be present at the bailing of such offender, and to certify it in writing at the next gaol-delivery; but the justices of peace and coroner in *London* [and the county of *Middlesex*, and in other cities, boroughs, and towns corporate within their several jurisdictions] to do as formerly: justices of peace, &c. offending contrary to the true intent of this act, the justices of gaol-delivery may fine them.

V. The statute of 2 & 3 *P. & M.* cap. 10. only provides for examinations and informations to be taken by the justices of peace, as well upon commitment as bailing of any prisoner for manslaughter, or other felony.

Upon these statutes, and that of 3 *E.* 1. which expressly saith, "That *for the death of a man* (*) a person is not bailable by law," it hath been questiond, whether justices of peace may bail in case of manslaughter.

On the one side, the statutes of 2 *Mar.* and 3 *Mar.* expressly admit that they may, and accordingly the usual practice hath been: *vide Lamb. Justice*, p. 25. & *sequentibus*.

On the other side, these things make against their bailing, *viz.* 1. The statute of *Westm.* 1. [3 *E.* 1.] cap. 15. recites expressly, that for the death of a man the offender is not by law bailable, and the very statute of 1 & 2 *P. & M.* refers to the statute of 3 *E.* 1. as the rule and standard for justices of peace to proceed by, in case of bailing.

(*) *Vide Glanvil, Lib. xiv. cap. 1 & 3.*

2. Again,

2. Again, the statute of *Gloucester*, cap. 9. (+) expressly provides, “ That he that kills a man by misadventure, shall remain in prison “ till the coming of the justices in eyre or gaol-delivery, and then he “ shall be tried;” and if in case of a death by *infortunium*, much more in case of a simple manslaughter.

3. The writ of *homine replegiando* excepts the case of the death of a man from bail.

4. It was resolved by all the judges of *England*, 7 Car. 1. that a man is notailable for manslaughter, as I had it from the book of the late chief justice *Hyde*, who accordingly did set a fine of 20*l.* upon a learned reader, being a justice of peace, and [139] now an antient serjeant at law for bailing a man in case of manslaughter in the county of *Salop*, which I knew to be true; and this was approved by most of the judges that heard it.

To settle this business therefore I say,

1. That in case of murder it is of all hands agreed, that the justices of peace cannot bail, but it is to be done regularly only in the king's bench.

2. That in case of manslaughter, if the fact be apparent by plain proof or confession that a man is kild, and kild by *J. S.* whether the same were done *ex malitiâ peccogitatâ*, or upon a sudden falling out, or but *se defendendo*, yet a justice of peace, or two justices, whereof one of the *quorum* cannot bail by any law in force.

3. That whether it do *constare de personâ occidentis*, or *de modo occidendi*, or not, yet if the party be indicted of manslaughter, nay tho it were but *se defendendo*, the justices of peace cannot bail.

4. But if there be a manslaughter committed, and it is certainly no more, and a party suspected is brought before two justices of the peace, whereof one is of the *quorum*, if the matter be doubtful and uncertain, whether this be the person that did the fact, the two justices of peace, whereof one is of the *quorum*, may bail that man, and that by virtue of the statute of 1 R. 3. cap. 3. which gave power to one justice of peace generally to bail any person suspect of felony, if it appear to him to be a light suspicion, (whereof he must needs be the judge), which doubtless extended to manslaughter; and altho the statute of 3 H. 7. cap. 3. transfers that power to two justices of peace, whereof one of the *quorum*, yet still it was bottomed upon the statute

(+) 2 Co. *Inst.* p. 315.

of 1 R. 3. and the statute of 1 & 2 P. & M. is bottomed upon that of 3 H. 7.

Again, the statute even of *Westminster* 1. [viz. 3 E. 1.] tho it say *de morte hominis*, there is no bail at common law, yet it must be intended, when the offender is certainly known, for it generally provides, that persons taken upon a light suspicion shall be bailed; and therefore the statute of 1 & 2 P. & M. when it makes the [140] statute of *Westminster* 1. the standard of their proceeding in point of bailment, and yet supposeth one taken for manslaughter bailable, must mean such a manslaughter, where the party is [only] suspected, not where the thing is done [by him]; for the words *bailable by law*, do not only refer to *felony*, which is the last antecedent, but *manslaughter*: and by this construction, all the statutes, and all parts of the statutes stand together (e).

(e) Since our author wrote there has been another very material statute in relation to bailment, viz. 31 Car. 2. cap. 2. commonly called the *habeas corpus* act. By this statute, §. 7. "If any person committed for high treason or felony shall pray or petition in open court the first week of the term, or first day of the sessions of *oyer* and *terminer*, or general gaol delivery, to be brought to his trial, and shall not be indicted some time in the next term or sessions after such commitment, the court is required upon motion made the last day of the term or sessions, to set at liberty such prisoner upon bail, unless it appears to the court upon oath made, that the witnesses for the king could not be produced the

"same term or sessions. And if any person so committed having made his prayer or petition as aforesaid, shall not be indicted and tried the second term or sessions after his commitment, or upon his trial, shall be acquitted, he shall be discharged from his imprisonment.

This act (which is related by bishop Burnet in his history of his own times, Vol. I. p. 485. to have passed the house of lords in a very remarkable manner,) is generally esteemed the great bulwark of *English* liberty, altho upon some important occasions it has been thought proper, as to treason, to suspend it for a time. See 6 Ann. cap. 15. 1 Geo. 1. cap. 8. & cap. 30. 9 Geo. 1. cap. 1.

C H A P. XVII.

Concerning the fourth general, namely, the various manner of bailing prisoners.

THE fourth thing comes to be considered, namely, the different manner of bailing of malefactors.

And this is of two kinds.

First, By writ.

Secondly, *Ex officio* without a writ.

And

And, *first*, Concerning bail by writ.

And these are of four kinds. 1. *Homine replegiando*. 2. *Breve de manucaptione*. 3. *Habeas corpus*. 4. *De odio & atia*.

1. The writ of *homine replegiando* lies for any person imprisond for a misdemeanor, wherein by the law he is bailable; and therefore in the writ there is an exception of the death of a man, persons imprisond by the command of the king or his justices, or for offenses of the forest, *vel pro aliquo alio reſto, quare ſecundū conſuetudinē Angliæ non ſit replegiabilis*. *F. N. B.* 66. *f*.

But tho offenses in the forest are excepted, yet a special writ of *homine replegiando* lies for one taken by the ministers of the forest (*nota*, not by the chief justice) *F. N. B.* 67. *a*.

So that this writ as to the point of bailing is founded upon the statute of *W. 1m.* 1. *cap.* 15. or at least governed by it, only in the statute there the exception is of persons taken by [command of] *the Justices*, here it is *capitalis iusticiarii*.

By this writ the sheriff is to deliver the party by mainprife; and if he returns, that *J. S.* makes title to the person imprisond, either as his villain or ward, &c. he is to take sureties of the party imprisond to appear in the king's bench or common-pleas, and to take bail of him for his appearance at the day, and to attach *J. S.* to appear at the same day, &c. where the business may be determind; and if *J. S.* be returned *non est inventus*, then a *capias in withernam* may be granted against him to take his body, and if a *non est inventus* be returned, a *withernam* to take his goods.

II. The writ of mainprife, and that is of two kinds, namely, 1. The general original writ *de manucaptione*. 2. Special writs of mainprife, both issuing out of the *Chancery*.

1. The general writs of mainprife are at large set down in the *Regist.* *f.* 268. & *ſeq.* and *F. N. B.* 250. & *ſequentibus*, and these writs seem to be grounded or directed also by the statute of 3 *E.* 1. *cap.* 15. for *that* is the rule and direction whereby persons are to be baid by this general writ; for no persons criminal are bailable by this common writ of mainprife, for as such they are bailable by that statute; and this common writ of mainprife respects either such as are committed by the sheriff or bailiff of a hundred, or such as, tho they are in the sheriff's custody, are yet committed to [142] his custody by others, as justices of the peace, &c.

1. As to those of the former kind, we must call to remembrance what hath been before said touching the power of the sheriff to take indictments of felony, either by commission or in his *Turn*.

The former power is repealed by the statute of 28 E. 3. cap. 9. As to the latter, though the power of taking indictments continues in the sheriff's *Turn*, yet by the statute of 1 E. 4. cap. 2. they are to send them to the justices of peace to be determin'd in their sessions; but the sheriff nor his bailiffs are not to arrest or attach any person thereupon; and the like law is for bailiffs of hundreds, who have a leet of the hundred or *Turn* accompanying it.

And therefore as to these, the writ of mainprise is consequentially taken away, according to my lord *Coke*, in his comment *super Westm.* 1. cap. 15. 2 *Instit.* p. 190.

But whereas it is there said, that *by that statute the writ of mainprise generally is taken away*, it is certainly mistaken, for the writ of mainprise hath still its use in cases of persons committed by the justices of peace, and some other cases, as shall be farther shewn.

2. The *second* sort therefore of these common writs of mainprise, were for such malefactors as were committed by others, if they were such as by the statute of *Westm.* 1. cap. 15. were bailable, and the writ of mainprise in this case continues in force and use to this day; as for instance, *F. N. B.* 250. d. for a person approved by an approver, if the approver is since dead; yet such a person can neither be taken by warrant of the sheriff or justice of peace, but by the coroner or justices of gaol-delivery.

F. N. B. 250. g. 251. c. for one indicted before the justices of peace for a trespass, 250. i. for forestalling, 250. e. as accessory to a felony, where the principal is not attain't.

Again, *F. N. B.* 250. f. for one taken by the king's commission for felony.

And this is that writ that seems intended by the book of [143] 14 H. 6. 8. a. where it is said, "That he that is taken by suggestion, as by justices of peace, &c. may be bailed without writ; but he that is taken by a writ, must be bailed by writ (*);" which seems intended of this writ of mainprise; and tho the saying be not universally true at this day, for some that are taken by process or writ may, at least at this day, be bailed *virtute officii*, especially upon the statute of 23 H. 6. cap. 10. & *Westm.* 1. cap. 15. yet it

(*) See our author's note *ad F. N. B.* 66. e.

sufficiently intimates, that the writ of mainprife was not taken away by 28 E. 3. cap. 9.

And thus far for the general writs of mainprife.

2. Special writs of mainprife were sometimes granted upon special occasions for those, that were not bailable otherwise.

Thus it was usual in antient times by the king's special warrant, sometimes by special commission, sometimes by immediate writ out of *chancery* in times of war, to deliver persons in prison for felony upon mainprife to go into foreign parts in the king's wars, as *Gascogne*, and elsewhere, at the king's wages, & *stabant recto in curia*, after their return, *si quis versus eos loqui voluerit*, and upon the return of such manucaptions into the chancery to have charters of Pardon. See precedents of such commissions and writs, *Pat.* 22 E. 1. m. 1. to *Roger Brabazon*, and *William Brereford*. *Rot. Vascon.* 22 E. 1. m. 8. n°. 11. & m. 12. n°. 4. for malefactors imprisond in all the gaols in *England* for felony and other crimes *per manucaptionem deliberand'*; and the like was often practised upon like occasions in the reigns of other kings.

And thus far for writs of mainprife.

III. The third usual writ for bailing of criminals, is by *habeas corpus*, and this is a writ of a high nature; for if persons be wrongfully committed, they are to be discharged upon this writ returned; or if bailable, they are to be bailed; if not bailable, they are to be committed.

This writ issues out of the great courts of *Westminster*, but hath different uses and effects.

1. It may issue out of the court of *Common-pleas* or *Exchequer*; but that is or ought to be always where a person is [144] privileged, or to charge him with an action.

If a person is sued in the common-pleas, or is supposed to be so sued, and is arrested for a pre-supposed misdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*; and if it appears upon the return, that the party is wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisond, the privilege shall be allowd, and the person discharged from that imprisonment; or if it be doubtful, he may be bailed to appear in the court of *King's-bench*, which hath conuance of the crime returned. *Coke Magn. Cart. cap. 29. 2 Inst. p. 55.*

And

And upon this account, *P. 43 Eliz. C. B.* in the case of *Bates* that was imprisond by the council-table, for not bringing in his subscription to the *East-India* company, and this being returned upon the *habeas corpus*, together with a writ against him out of the common-bench, they adjudged the privilege to be allowd, and the party to be discharged (*a*).

But if a man be sued in the common-bench, and is arrested and imprisond for felony, tho the gaoler, upon the *habeas corpus*, ought to return the causes, as well criminal as that wherewith he is charged out of that court, yet the court of common pleas ought not to commit him to the *Fleet*, nor discharge him of the imprisonment, nor yet to take bail of him to answer there, for they have not consufance of such crimes; the like it is, if he be returned committed for a riot or surety of the peace by justices of peace; and therefore all they can do is to take his appearance, and take him to mainprife upon the action, and remand him as to the matter of crime, for which he was well committed by the justices, and to remand his body to the sheriff's custody upon his commitment for the crime. 2 *H. 7. 2. a.*

But now by the statute of 16 *Car. 1. cap. 10.* they have an original jurisdiction to bail, discharge, or commit upon an *habeas corpus* [145] for one committed by the council-table, as well as the king's bench, and that altho there be no privilege for the person committed.

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or discharge, or remand, as the case requires, tho there be no privilege returned. *Coke on Mag. Cart. cap. 29. 2 Instit. p. 55.* but some things they differ in.

The *king's bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itself.

And if there be returned even upon that writ any civil action, and also a matter of crime, as if a person be arrested for debt, and also charged with a warrant of a justice of peace for felony; in that case, 1. If it appears to the judge or court, that the arrest for debt or other

(a) See *Moor* 838. & *seq.*

civil action is fraudulent, they may remand him. *Dyer* 219. *b. Harriſon's caſe*. 2. If it be found real, they may commit him to the king's-bench with his cauſes, tho they are matters of crime, for that court hath conſiſtance, as well of the crime, as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they ſee cauſe, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not ſingly a matter of crime to be return'd, for that belongs to the *habeas corpus ad ſubjiciendum*.

The other writ is the *habeas corpus ad ſubjiciendum*, which is for matters only of crime, and is not regularly to iſſue nor be returnable but in the term-time, when the court may judge of the return, or bail, or diſcharge the priſoner (*b*).

THE

(*b*) By the ſtatute of 31 *Car. 2. cap. 2.* ſuch writ may iſſue in the vacation time on behalf of any perſon, who ſtands committed for any crime unleſs for felony or treason plainly expreſſ in the warrant of commitment, or as accellary before to any petty treason, or felony, or upon indictment thereof; other than perſons convict or in execution, for by that ſtatute it is provided, That if any ſuch perſon, or any one on his behalf, complain to the lord chancellor, or lord keeper, or any one of his majeſty's juſtices either of the one bench or of the other, or the barons of the exchequer of the degree of the coſt, and the ſaid lord chancellor, &c. or any of them, upon view of the copy of the warrant of commitment or detainer, or otherwiſe upon oath made, that ſuch copy was denied to be given by ſuch perſon in whole cuſtody the priſoner is detained, are hereby authorized and required under the penalty of 50*l.* upon requeſt made in writing by ſuch perſon or any on his behalf, attelleſt and ſubſcribed by two witneſſes, who were preſent at the delivery of the ſame, to award an *habeas corpus* under the ſeal of ſuch court, whereof he ſhall then be one of the judges, to be directed to the officer in whole cuſtody the party is committed or detained ſhall be, returnable immediately before the ſaid lord chancellor or ſuch juſtice, &c. and upon ſervice thereof, as aforeſaid, the officer or his under officer ſhall (within three days after ſuch ſervice, if not beyond the diſtance of twenty miles, or ten days, if above twenty miles, and not beyond the diſtance of an hundred miles, or twenty days, if above

the diſtance of one hundred miles), under the penalty of 100*l.* bring ſuch priſoner before the ſaid lord chancellor or ſuch juſtice, &c. before whom the ſaid writ is made returnable, and in caſe of his abſence before any other of them, with the return of ſuch writ and the true cauſes of the commitment and detainer, and thereupon, within two days after the party ſhall be brought before them, the ſaid lord chancellor, &c. before whom the priſoner ſhall be brought, as aforeſaid, ſhall diſcharge him from his impriſonment, taking his recognizance with one or more ſureties in any ſum according to their diſcretions, having regard to the quality of the priſoner, and nature of the offence, for his appearance in the court or king's bench the term following, or at the next aſſizes, &c. or in ſuch other court, where the ſaid offence is properly cognizable, as the caſe ſhall require, and then ſhall certify the ſaid writ with the return thereof, and the ſaid recognizances into the ſaid court, unleſs it ſhall appear unto the ſaid lord chancellor, &c. that the party ſo committed is detained upon a legal proceſs, order, or warrant out of ſome court, that hath jurisdiction of criminal matters, or by ſome warrant ſigned and ſealed with the hand and ſeal of any of the ſaid juſtices, or barons, or ſome juſtice of the peace for ſuch matters or offences, for which by law the priſoner is not bailable.

No perſon to be entitled to the benefit hereof, unleſs he ſhall pay, or caſe to be paid or tendered the charges of bringing, to be aſſertained by the judge or court that awarded the writ, and ſubſcribed thereon,

Till the return filed the court may remand him, after it is filed the court is either to discharge, or bail, or commit him, as the nature of the cause requires.

[147] If together with the *habeas corpus* there issues a *certiorari* to remove the indictment, yet in case of felony, tho the body and record be returned and filed, the court may remand him and the record by the statute of 6 H. 8. cap. 6. but in other cases the record cannot be remanded, but they must proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record also by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may issue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the statute of *Magna Charta*, and by the very common law, an *habeas corpus* in criminal causes may issue out of the *Chancery*. *Coke on Magna Charta*, cap. 29. 2 *Instit.* p. 55.

But it seems regularly this should issue out of this court in the vacation time, but out of the king's bench in the term-time, as in case of a *superfedeas* upon a prohibition. 38 E. 3. 14. a. B. *Superfedeas* 13.

When the cause is returned, the chancellor may judge of the sufficiency or insufficiency thereof, and may discharge or bail the prisoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, discharge, or commit the prisoner.

But if the chancellor shall not discharge him, but bail him, this surety must be to appear in the king's bench; or if the chancellor shall

"thereon, not exceeding 12d. per mile,
"and give security by his own bond to pay
"the charges of carrying back, if remanded
"by the court or judge, and that he will
"not make any escape by the way.

Is is further provided by this statute,
"That no person set at large upon any
"*habeas corpus* shall be re-committed for
"the same offense, but by order of court
"having jurisdiction of the cause; any per-
"son knowingly offending herein to for-
"feit goal.

"This writ to run into counties palatine
"and privileged places.

"That no subject of England be sent pri-
"soner into Scotland, or any places beyond
"the sea, either within or without his
"Majesty's dominions, under the penalty
"of a *tamoure*, except persons ordered

"to be transported, or offenders sent to be
"tried, where their offenses were com-
"mitted.

"That after the assizes proclaimed and
"during the continuance thereof no pri-
"soner be removed but before the judge
"of assize in open court, nor at any other
"time, but by *habeas corpus*, or other legal
"writ, except where the prisoner is de-
"livered to the constable, &c. to be carri-
"ed to the common gaol; or where any
"person is sent by order of any judge of
"assize, or justice of peace, to any com-
"mon workhouse or house of correction;
"or is removed from one place to another
"within the same county, in order for his
"trial or discharge in due course of Law;
"or in case of sudden fire, infection, or
"other necessity."

do neither, it seems he may commit him to the *Fleet* till the term, and then he may be turned over to the king's bench, and there proceeded against, for the chancellor hath no power to proceed in criminal causes.

And if the *habeas corpus*, and also a *certiorari* be granted, returnable in *Chancery*, and the cause and body be returned there, they may be sent into the king's bench; if the body only be returned with his causes by *habeas corpus* into the *Chancery*, and delivered over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record also, and thereupon commit or bail the prisoner, [148] as there shall be cause.

But the sending an *habeas corpus ad faciendum & recipiendum* by the chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law, nor ancient usage, and particularly forbidden by the statute 2 *H. 5. cap. 2.* as to persons in execution.

And thus far of bailing by *habeas corpus*.

IV. Touching the writ *de odio & atia* for a man accused of manslaughter, in some places called a writ *de bono & malo* and *de ponendo ad bailium*, it is grounded upon the statute of *Magna Charta, cap. 26.* repealed by 28 *E. 3. cap. 9.* and revived again, as is supposed, by 42 *E. 3. cap. 1.* whereby all acts made against *Magna Charta* are repealed. It is a writ much out of use, but the whole learning concerning it is put together by my lord *Coke* upon *Magna Charta, cap. 25. 2 Instit. p. 42.* and upon *cap. 29. 2 Instit. p. 55.* and thither I shall refer myself.

It has been refused by reason of the great trouble in the attaining and execution of it, for, 1. There must be a writ to inquire *de vita & membris.* 2. There must be an inquisition taken. 3. He was to be bailed by twelve persons.

And now the justices of gaol-delivery usually going their circuits twice a year, unless in the four northern counties, a prisoner comes to his trial as soon, if not sooner, than such inquisition and mainprise can be taken.

And thus far of manucaption or bail by writ.

The second general is bailing *virtute officii.*

The court of king's bench may *virtute officii* bail any person brought before them, of what nature soever the crime is, even for treason or murder, as hath been before shewn, *p. 129.*

Concerning bailment of felons by justices of the gaol-delivery and of the peace *virtute officii*, and the statutes relating to them, enough hath been said before.

The sheriff, it seems, might *ex officio* without writ at common law bail offenders indicted before him in his *Turn*, or upon a commission [149] to him; but this power is in effect taken away from him in cases of felony, by the statutes of 23 E. 3. cap. 9. and by the statute of 1 E. 4. cap. 1. and 1 R. 3. cap. 3. transferred to the justices of the peace, as hath been before declared.

The marshal of the king's bench took upon him antiently *virtute officii* to bail persons indicted or appealed; but this is wholly taken from him by the statute of 5 E. 3. cap. 8.

3 Wilson, 172. 183.

C H A P. XVIII.

Concerning warrants to search for stolen goods, and seizing of them.

I THOUGHT fit to insert this business in this place. 1. Because it is a business preparatory to the discovery of felons, and preparing evidence against them, and to the helping of persons robbed to their goods. 2. Because it is found by experience of great use and necessity, especially in these times, where felonies and robberies are so frequent. And therefore this means of discovering of them is now grown common and usual, much more than in antient times; and if it should be disused or discountenanced, it would be of public inconvenience; and therefore I can by no means subscribe to that opinion of my lord Coke's, 4 *Instit. cap. 31. p. 176.* as it is there generally set down, "That justices of peace have no power upon a bare surmise to break open any man's house to search for a felon or stolen goods either in the day or night." (c).

The moderation and temperaments that are to be added to these warrants, are these:

[I. Touching the granting thereof.]

(c) *Vide supra*, p. 79, § 107.

1. They

1. They are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons of such suspicion.

And therefore I do take it, that a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact.

And therefore I take those general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them.

2. It is fit that such warrants to search do express, that search be made in the day-time, and tho I will not say they are unlawful without such restriction, yet they are very inconvenient without it, for many times, under pretense of searches made in the night, robberies and burglaries have been committed (*), and at best it creates great disturbance.

3. They ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, tho it is fit the party complaining should be present and assistant, because he knows his goods.

4. It ought to command, that the goods found, together with the party in whose custody they are found, be brought before some justice of the peace, to the end that upon farther examination of the fact the goods and party, in whose custody they are found, may be disposed, as to law shall appertain.

And the reason is, tho the receiving of stolen goods doth not *ipso facto* make a man an accessory to felony, tho he know them to be stolen (†), yet he carries with it a great presumption, that the receiving of them was to aid the felon; and besides, by the [151] examination of the receiver evidence may be gotten to discover the felon.

(*) *Vide Part I. p. 553. Co. P. C. p. 64. Kcl. 43.*

(†) But now by 3 & 4 W. & M. cap. 9. & 5 Ann. cap. 31. whoever knowingly

buys or receives stolen goods shall be taken as accessory to the felon. *Vide Part I. p. 620.*

II. Touching the execution of this warrant.

1. Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day-time may enter *per ostia aperta* to make search, and it is justifiable by this warrant.

2. If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door, and neither the officer nor the party that comes in his assistance are punishable for it, but may justify it upon the general issue by the statute of 7 *Jac. cap. 5.* so that *in eventu* it is justifiable by both, for it is a process for the king, and includes a *non omittas*, and the very having of the goods carries a sufficient ground *prima facie* of suspicion, that he was the felon that stole them, and may be thereupon justifiably arrested.

3. If the goods be not in the house, yet it seems the officer is excused that breaks open the door to search, because he searcheth by warrant, and could not know whether the goods were there till search made; but it seems the party that made the suggestion is punishable in such case, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there.

III. Now upon the return of this warrant executed, the justice, before whom it is returned, hath these things to do:

1. As touching the goods brought before him, if it appears they were not stolen, they are to be restored to the possessor; if it appears they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed by indicting and convicting the offender to have restitution.

2. As touching the party, that had the custody of the goods.

If they were not stolen, then he is to be discharged.

If stolen, but not by him, but by another that sold or delivered them [152] to him, if it appears that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appears he was knowing they were stolen, it is fit to bind him over to answer the felony, for there is a probable cause of suspicion, at least that he was accessory *after*.

C H A P. XIX.

Concerning Presentments, Inquisitions, and Indictments, and their kinds.

I HAVE gone through those matters, that are preparatory to the proceeding against malefactors in the several courts, wherein their offenses are punishable, namely, the arrest and imprisonment, or bailing of offenders, and the several jurisdictions, and justices, and ministers of justice concerned therein.

That which follows to be considered is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the suit of the party, or by indictment which is immediately the king's suit.

The former of these, namely appeals, I shall consider after the business of indictments, because it is but rare to have an appeal, and the most prosecutions of this nature are by indictment or presentment, and therefore I shall consider this first.

I shall distribute this matter into these general heads, namely, 1. Touching indictments and presentments. 2. Process. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution. Each of which will take in several particular heads and distributions.

Presentment is a more comprehensive term than *indictment*, for regularly an indictment is an accusation given *in* against a person by the grand inquest for some misdemeanor whereunto he is put to answer; but presentments do not only include such indict- [153] ments, but also some other informations whereunto the party is not put to answer, as presentments of *felō de se*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others.

In this title concerning presentments and indictments I shall consider these points. 1. The several kinds of presentments and indictments. 2. Where a man shall be put to answer in criminals without indictment. 3. Who may be indicters, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or presenting. 6. What formalities are required in indictments.

First, Touching the several kinds of presentments, inquisitions and indictments in matters capital.

They may be distinguished, 1. In relation to the courts or judicatories, or jurisdictions, where they are made.

And, 2. In respect of their effects or natures.

I. Touching the former branch of distribution in relation to the jurisdictions where made, and *that* multiplies presentments or indictments according to the jurisdictions, as some are in the leet, some in the sheriff's *Turn*, some before the coroner, some before justices of peace, justices of *oyer* and *terminer*, gaol-delivery, king's bench, whereof enough before hath been said, and shall not need here to be repeated.

But those, that most concern capital offenses, are such as are taken before the coroner, or such as are taken before justices by commission, whereof more shall be said in the ensuing chapters.

II. As to the second kind of distribution in respect of the nature and effect thereof.

1. Some presentments are of themselves convictions, and not traversable.

2. Others are not convictions, but only in nature of informations, and therefore traversable.

Regularly all presentments or indictments before justices of the peace, *oyer* and *terminer*, gaol-delivery, &c. are traversable, and conclude not the party or those claiming under him.

[154] And therefore, tho it hath been held, that the presentment of a *felo de se* before the coroner be not traversable, (*de quo supra*,) yet of all hands it is agreed, that a presentment of a *felo de se* before justices of peace or *oyer* and *terminer* is traversable by the executors, &c. *Co. P. C. cap. 8. p. 55. H. 37 Eliz. B. R. Laughton's case.*

If a presentment be made *super visum corporis*, that *A.* kild *B.* and fled, this presentment of the flight is held not traversable, but conclusive to forfeit the goods, tho he be after acquitted of the felony, and expressly found by the petty jury upon his trial, that *non se retraxit (d)*, 13 *H. 4. 13. b. Forfeiture 32. 3 E. 3. Forfeiture 35. 7 Eliz. Dy. 238. b.* And the same law is, if it be found *super visum corporis*, that the felon fled and was kild in the flight, this present-

(d) *Vide supra*, p. 63, 64.

ment, tho after the party's death, is conclusive as to the forfeiture for the flight. 3 E. 3. *Coron.* 289, 290. 312.

But if before justices assigned to hear and determine, it be presented, that *J. S.* committed a felony and fled; or if upon the arraignment of a person for felony he be found not guilty, and that he fled, this is but in nature of an inquest of office, and the flight is traversable in an action, or information, or *scire facias* brought by the king for the goods of the person; 37 *Affiz.* 7. 47 E. 3. 26. a. And all the reason, that can be given why the coroner's inquest of a *fugam fecit* is conclusive, and not the other, is only that which is given 8 E. 4. 4. a. *Ceo est un ancient positif ley del coron'.*

If a man be presented to have sufferd an escape, because in this case the party is at least to be fined, he shall have his traverse to it, and is not concluded by it.

But if either before the justices in eyre, or before the coroner, an escape be presented upon a vill either before or after the arrest, this is held not to be traversable, because there is only an amercement to be set upon the vill. *viz. villata in misericordiâ*; and the reason given by *Stamford* is, *quia de minimis non curat lex*; *Stamf. P. C. Lib. I. cap. 32. f. 35. b.*

But if it fall out, that there be an indictment for such an escape, (as there hath been been formerly against the city of *London* for the escape of those that riotously kild Dr. *Lamb* (e), who were [155] thereupon fined 2000*l.*) such an indictment is not conclusive, but traversable.

Whether an inquisition of a *felo de se* before the coroner be traversable, *vide quæ supra, Part I. cap. 31. p. 414.*

And there are no presentments besides what are before mentiond, that are in themselves convictions and not traversable, but a presentment in a leet of bloodshed or the like, and in the *Swanimote* court of the forest for offenses of *Vert* and *Venison*.

But even those presentments are traversable also in two cases, *viz.* 1. If the offense presented be out of their jurisdiction. 2. Or if the presentments be such as concerns the freehold, as presentments of nuisances, or such matters as charge the freehold; 41 E. 3. 26. b. 45 E. 3. 8. b.

And therefore it was resolved in the *Exchequer* in a *quo warranto* against the water-bailiff and conservator of the river *Severn*, 22 Car. 2.

that upon a bare presentment the conservators cannot set a fine upon a supposed unlawful fishing or the like, unless the party comes in and confesses it, or pleads to it, and be convicted by a jury of the offense.

A presentment of a riot or forcible detainer by a justice or two justices of peace, as the case shall require, is a conviction by the statute of 15 R. 2. *cap.* 2. 8 H. 6. *cap.* 9. 13 H. 4. *cap.* 7.

But a presentment by a justice of a default in repairs of an highway, tho by the statute of 5 Eliz. *cap.* 13. it is such a presentment as the parties shall be put to answer, yet it is not conclusive, but the traverse of the party is saved by the statute; and it is but reason, for tho the view of the justice can ascertain the decay or want of repairs, yet it cannot ascertain in what parish it lies, or who is bound by tenure or prescription to repair.

Burn. Titles, Indictment & Presentment. 4 Blackf. Com. ch. 23. p. 361, 362—367.
Index to 2 Hawk. P. C. tit. Indictment. Presentment.

[156]

C H A P. XX.

Where a man shall be put to answer in criminal and capital offenses without indictment at the king's suit.

AT the common law there were several means of putting the party to answer a felony without any indictment, some whereof are still in force, others are taken away by statute.

I. If a thief or robber were taken with the *mainouvre*, *cum manu opere*, and the *mainouvre* brought into court with the prisoner, he should have been arraigned upon the *mainouvre* at the king's suit; 2 E. 3. *Coron.* 156. And therefore M. 18 & 19 E. 1. *coram rege*, rot. 28. *Norw. Et quia prædictus Johannes de Brampton [falsarius sigilli regis & brevium suorum, ut dicitur,] non est appellatus, nec indictatus, nec captus cum manu opere, per quod secta domino regi in hujusmodi casu potest competere, idè [consideratum est, quòd] prædictus Johannes [eat inde] sine die, &c.*

And T. 10 E. 2. rot. 132. Bucks, Robert Legat was arraigned for counterfeiting the king's seal, upon the counterfeit commission brought

brought into court without indictment, and he pleaded not guilty, and was acquit (*).

But upon a bare information or bill, without indictment or the *mainouvre* at common law, no party was to be put to answer for a felony; and therefore, *M. 20 & 21 E. 1. coram rege, rot. 27. Hibernia, William Prene*, the king's carpenter in Ireland, being accused for felony by a bill in the king's-bench there, and convicted and condemned, but after ransomed for 200*l.* and a writ of error brought in the king's-bench in *England*, and assigned, that he ought not to be put to answer in case of life or member *per vocem & per billam, quam Nigellus le Broun, porrexit versùs ipsum, licèt non esset indictatus per 12. (f).* [149*]

But it seems to me, that this proceeding upon the *mainouvre* is wholly taken away by the statutes of 25 *E. 3. cap. 4.* 28 *E. 3. cap. 3.* 42 *E. 3. cap. 3.* and therefore I do not find any proceeding upon the *mainouvre* since these statutes.

II. A second sort of proceeding in cases capital without indictment is, where an appeal is brought at the suit of the party, and the plaintiff is nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal; and so it is in case the appellant die or release; and in such case, altho the party be indicted as well as appeal'd, yet upon the nonsuit of the plaintiff, the proceeding for the king shall not be upon the indictment, but upon the appeal. 4 *E. 4. 10. a.*

But this hath these two qualifications.

1. It must be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare suing of a writ without a declaration is not such an appeal as, the party being nonsuit, the defendant shall be thereupon arraigned; for

(*) *Vide Part I. p. 185 & 349.*

(f) That case was thus: *William Prene* assigned for error that " par ceo que le commune laie de *Engleterre*, e de *Irelande* veut, ke nul homme par bille sanz enditement, ou par lute de apel, suz les plez de corone, ne fait [soit] attache, ne mis en responz; yet that he the said *William* had been imprisond, & de divers fel niss accusatus par une bille par *Nel le Broun* bote en mayns des justices; altho par enquest, ne par chapiter, ne fut endite." And upon consideration of the whole matter the court of king's-bench in *England* were of opi-

nion, " Quod prædictum recordum est irritandum, & adnichilandum; & idco mandatum est capitali justic' *Hibernie*, quod corrigat, &c. & accepta securitate de prædicto *Willelmo* ad standum recto in com' ubi deliquisse debuit, & vocatis super hoc convocandis ponat prædictum *Willelmum* per apertum & manifestum indictmentum de certis felonis in certis locis, si aliquis vel aliqui eum fortè indictare sive appellare voluerit secundum legem & consuetudinem regni, &c. & quod interim per manucapcionem bona & catella, terras & tenementa, eidem *Willelmo* deliberet, &c.

1. The writ may be brought in his name by a stranger without his privity. 2. Because the writ alone contains not such certainty of time, place, and other matters, whereby the party may be put to answer. 7 *H.* 7. 6. *b.*

2. It must be where an appeal is well begun, and by a party enabled to prosecute it, therefore, if the appeal abates, because a plaintiff is outlawed, or a woman (who cannot bring an appeal, but only of the death of her husband,) or if the year and day be past, [150*] or by the misnomer of the defendant, &c. there the appellee shall not be arraigned at the king's suit, because the appeal was never good, but shall be dismissed, only the judges may arraign him upon an indictment, if any be before them for that offense, or if none be, yet they may bind him over to another sessions, and in the mean time to be of good behaviour; 19 *E.* 2. *Coron.* 317. All the learning touching this business is fully declared by *Stamf. Lib.* III. *cap.* 59. *f.* 147. & *sequentibus.*

III. A third sort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter (*g*).

IV. The fourth sort is by appeals by particular persons, especially of treason in parliament; and this was very frequent in ancient times, especially in the time of *R.* 2. namely *anno septimo, undecimo & duodecimo*, which bred great inconveniencies.

And therefore by the statute of 1 *H.* 4. *cap.* 14. all these kinds of appeals in parliament are wholly taken away; and since that time I find not any such appeals brought in parliament.

And therefore, when the now earl of *Bristol*, in this present parliament, in the lords house preferred articles of high-treason and other misdemeanors against the earl of *Clarendon*, then lord chancellor, upon a reference unto all the judges, and upon great consideration the judges *unâ voce* returned their opinion, that these articles were contrary to the statute of 1 *H.* 4, and could not be preferred in the lords house by the said earl, or any other private person (*h*).

But impeachments by the house of commons of high treason, or other misdemeanors in the lords house have been frequently in practice, notwithstanding the statute of 1 *H.* 4. and are neither within

(*g*) *Vide infra, cap.* 29. *p.* 226.

(*h*) See *Stat. Tr.* Vol. II. *p.* 550.

the words nor intent of that statute, for it is a presentment by the most solemn grand inquest of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri*, upon not guilty pleaded, the defendant be convicted, this antiently served in nature of an indictment of felony, 13 *Affiz.* 6. 18 *E.* 3. 32. *a. Stamf. P. C. f.* 94. *b.* So if upon a special verdict in trespass brought in the king's-bench, it be found, that the de-^[151*] fendant took them feloniously, antiently this served for an indictment. 31 *E.* 1. *Enditement* 31.

So if in an action of slander for calling a man thief, the defendant justifies that he stole goods, and issue thereupon taken, it be found for the defendant, if this be in the king's-bench, and for a felony in the same county where the court sits, or if it be before justices of assize, who have also a commission of gaol-delivery, he shall be forthwith arraigned upon this verdict as on an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, tho in a civil action, serves the king's suit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E.* 3. which enact, *that no man shall be put to answer, &c. but upon indictment or presentment.*

But if the sheriff returns a rescue of a prisoner taken for felony, 1 *H.* 7. 6. *a.* or a breach of prison by one arrested for felony, 2 *E.* 3. 1. *b.* this is not sufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum, Stamf. P. C. Lib.* II. *cap.* 29. *f.* 95. *a.*

By the statute of 11 *H.* 7. *cap.* 3. there was power given to proceed upon all penal statutes by information before justices of assize and peace, but there is an exception of all cases of treason, murder and felony.

Ill use was made of this statute by *Empson* and *Dudley*, and great inconvenience and trouble to the people did arise by it, and therefore by 1 *H.* 8. *cap.* 6. it was repealed.

And tho informations are practised oftentimes in the crown-office in cases criminal, and by many penal statutes the prosecution upon them is by the acts themselves limited to be by *bill, plaint, information* or *indictment*, yet thus much is observable.

1. That the method of prosecution of *capital* offenses is still to be by indictment, except the cases above mentiond.

2. That

2. That in all criminal causes the most regular and safe way, and most consonant to the statutes of *Magna Carta*, cap. 29. 5 E. 3. cap. 9. 25 E. 3. cap. 4. 28 E. 3. cap. 3. & 42 E. 3. cap. 3. is by presentment or indictment of twelve sworn men.

[152*]

C H A P. XXI.

Who may be indictors, and where and how returned.

INQUISITIONS, presentments, or indictments are taken before courts, or officers of several kinds, and accordingly by acts of parliament several things are prescribed touching them.

I. Touching inquests before coroners: By the statute of 4 E. 1. *De officio coronatoris*, the coroner is to issue his precept to four, five or six vills to appear before him at a certain day to make inquiry, this precept is directed to the constables of the vills, who accordingly give summons to a competent number of inquirers, twelve at least (*i*), and by them the inquisition is made, when they have been sworn and have heard their evidence upon oath taken before the coroner.

II. Touching inquests of felonies in leets and *Turns*. By the statute of *Westminster* 2. cap. 13. indictments in the sheriffs *Turns* are to be by twelve at least, and they are to set their seals to the inquisitions, otherwise they are void (*k*).

And by the statute of 1 E. 3. cap. 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the sheriff or steward.

And by the statute of 1 R. 3. cap. 4. no person shall be returned upon a pannel in the sheriff's *Turns*, unless he hath 20s. *per ann.* of freehold, or 26s. 8d. of copyhold, and all indictments in the *Turn* taken otherwise shall be void.

But now by the statute of 1 E. 4. cap. 2. the sheriff cannot proceed upon any indictments for felony, or otherwise taken in his *Turn*, but must send them to the sessions of the peace, and the justices there are to make process and proceed thereupon.

(i) *Cobart's case supra*, p. 161. in notis.

(k) 2 Co. *Instit.* p. 387.

But then there must be care taken, 1. That the indictments be of such matters only, as are within the jurisdiction of the sheriff's *Turn*, otherwise the justices may not proceed upon them, 4 E. 4. 31 a. 8 E. 4. 5. b. (*) and 2. That they be by indenture, and under the seals of the presenters, according to the [153*] former statutes.

III. Indictments taken in the county of *Lancaster* before the sheriff or justices against any person inhabiting out of the same county, or taken in any other county against inhabitants of the county of *Lancaster*, ought to be by twelve men, and each indictor to have lands or tenements of the yearly value of 5*l.* by the statute of 33 H. 6. cap. 2. (+).

IV. Touching murders, &c. committed in the king's palace, the statute of 33 H. 8. cap. 12. hath appointed, that twenty-four of the king's yeomen officers of the cheque-roll of the king's house shall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before justices itinerant, the course was this: There first went out the writ of the common summons of the *eyre*, directed to the sheriff to summon *de quâlibet villâ quatuor homines & præpositum, & de quolibet burgo duodecim legales burgenſes*, to be at the day and place for the *eyre*, and upon that day the sheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and those bailiffs were sworn to elect two men in their several hundreds, and present their names to the court, and these two hundreders for each hundred were to choose of themselves, and the rest of their several hundreders respectively, ordinarily sixteen, or sometimes only twelve, who were severally sworn upon inquiries and presentments of things done within their hundred, as so many grand inquests for every several hundred, and the twelve returned for each borough were the grand inquest for the borough; this caused a vast and chargeable attendance upon the courts in *eyre*, and hath been long disused, and therefore I shall not say more of it.

VI. Concerning the choosing and returning of the grand jury before justices assigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I shall be somewhat more large; because, before these justices, ordinarily, criminal and capital causes are heard and determined.

(*) *Vide supra*, p. 71.

(†) *Part I. p. 286.*

Upon the summons of any session of the peace, there goes out a precept either in the name of the king, or of two or more justices of peace, directed to the sheriff, that *non omittas propter aliquam libertatem in ballivâ tuâ, quin eam ingrediaris, & venire fac' tali die ac loco viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, tam infra libertates, quàm extra, ad faciendum & exequendum ea quæ ex parte domini regis tunc & ibidem eis injungantur, and a scire fac'* to all coroners, constables, and bailiffs, &c. to be there at that day. *Lamb. Lib. II. cap. 2.*

And according to others, *Venire fac' viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, quorum quilibet habeat 40s. per ann. liberi tenementi ad minus, venire fac' etiam viginti quatuor tam milites quàm alios probos & legales homines de corpore comitui, quorum quilibet habeat 40s. de terris & tenementis liberi tenementi, ad inquirend' super iis, quæ ex parte domini regis ad tunc & ibidem eis injungerentur, præmunientes, omnes justiciarios ad pacem, constabularios, &c. Crompt. f. 212. a.*

And in cases of commissions of oyer and terminer, and gaol-delivery, *Quod non omittas propter aliquam libertatem, quin eam ingrediaris, & venire fac' tam viginti quatuor probos & legales homines de quolibet hundredo com' prædict', ad inquirendum, præsentandum, faciendum & exequendum ea omnia, quæ ex parte domini regis tunc & ibidem eis injungerentur, quàm alios viginti quatuor probos & legales homines de com' prædict' ad faciend' juratam inter dominum regem & prisiones prædictos, &c. Co. Entr. f. 55. a.*

Upon this precept the sheriff is to return twenty-four or more out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, oyer and terminer, or gaol-delivery, are taken and sworn *ad inquirendum pro domino rege & corpore comitatûs*, (not as antiently in eyre, a kind of grand inquest out of every hundred); but in some counties, which consist of gildable and such franchise, where anciently several justices of gaol-delivery sat, as in *Suffolk* (*), there are two grand juries, one for the gildable, another for the franchise, because there are two several commissions of gaol-delivery.

[155*] Now touching the grand jury thus returned before justices assigned, there are some things considerable.

(*) *Vide supra, p. 16.*

They must be *probi & legales homines*, and therefore if any one of the indictors be outlawd, tho in a personal action, it is a sufficient plea to avoid the indictment; 11 H. 4. 41 b. M. 4 Car. B. R. Creke, p. 134, Sir William Withpole's case, and the statute of 11 H. 4. cap. 9. hereafter mentioned fortifies this, *de quo infra*.

And therefore if any of them be attainted in a conspiracy, or *decies tantum*, or of perjury, or outlawd in any personal action, or attaind of felony, or in a *præmunire*, they are not to be indictors, because in law they are not *probi & legales*. Lamb. Justic. 391.

Touching their *annuus census*, I do not find any thing determin'd, but freeholders they ought to be. The statute of 2 H. 5. cap. 3. that requires jurors that pass upon the trial of a man's life, to have 40s. *per ann.* freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions (†).

By the statute of 11 H. 4. cap. ultimo, reciting, that inquests had been formerly returned of persons outlawd, fled to sanctuary for treason or felony, &c. enacts, "That no indictments be made by such persons, but by inquest of loyal subjects returned by the sheriffs or bailiffs duly, without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it be void."

Upon this statute it hath been resolv'd in Sir William Withpole's case, above cited. 1. That it extends to coroners inquests. 2. It is a good plea upon this statute, that one of the indictors is outlawd in a personal action, as well as of felony, or that any of the jurors were impannell'd at the denomination of any, contrary to this statute.

By the statute of 3 H. 8. cap. 12. it is enacted, "That the justices of gaol-delivery, and justices of peace, whereof one of the *quorum*, in open sessions, may reform the pannels returned by the sheriff, (which be not at the suit of the parties), by putting to, and taking out the names of the persons returned, and shall [156*] command the sheriff to return the same accordingly, upon pain of 20l. and the king's pardon to be no bar to the prosecutor."

This act extends not only to pannels of grand inquests returned, but also to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the justices according to this act, and the sheriff is bound to return the pannel so reformed.

(†) *Vide infra*, p. 272. in notis.

The grand inquest returned the first day of the sessions, and sworn, commonly serves the whole sessions of the peace, *oyer and terminer*, or gaol delivery; yet the court may command another grand inquest to be returned and sworn, which is done ordinarily upon two occasions.

1. If before the end of the sessions, the grand jury having brought *in* all their bills, are discharged by the court, and after that discharge, either some new felony, or other misdemeanor is committed, and the party taken and brought into gaol; or if after the discharge of the grand inquest, some offender be taken and brought *in* during the sessions. In the former case, there is a necessity to make a special record of the adjournment of the sessions from day to day, because otherwise the whole sessions are in supposition of law only the first day, and therefore without the entry of such adjournment, the offense and proceedings will be, in supposition of law, after the sessions ended, and so the proceeding will be erroneous (*): this was the case of *Sampson (h)*, who being arraigned and tried for a murder committed after the first day of the sessions, and before the sessions ended, for want of entry of an adjournment it was ruled erroneous. And the same is to be observed, if upon record it appears, that the grand inquest was returned after the first day of the sessions, unless an adjournment be entered of record.

2. The second ordinary instance of a new grand jury returned, is upon the statute of 3 H. 7. cap. 1. namely, a grand inquest impanelled to inquire of the concealment of another grand inquest, upon which defaults presented, the former grand inquest is to be amerced; and this, tho it mentions only an inquest thus to be taken by justices [157*] of peace, yet it extends to the king's bench, and hath been practised there accordingly in my knowledge, and possibly at the sessions of *oyer and terminer* and gaol-delivery, tho that can rarely come in question, because the sessions of the peace ordinarily accompanies those commissions.

And this is the proper and legal way of punishing the grand inquest, if they refuse to present such things as are within their charge, and for which they have probable evidence to make a presentment; but of this more in the next chapter.

(*) *Supra*, p. 24.

(h) *W. Jones*, 420.

CHAP. XXII.

Concerning the demeanour of the grand inquest, in relation to their presentments.

THE coroners inquest may, and must hear evidence of all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office, *quomodo J. S. ad mortem suam devenit*, tho it be also true, that the offender may be arraigned upon that presentment.

But the grand inquest before justices of peace, gaol-delivery, or *oyer and terminer*, ought only to hear the evidence for the king; and in case there be *probable* evidence (*a*), they ought to find the bill, because it is but an accusation, and the party is to be put upon his trial afterwards.

But if a bill of indictment for murder, or other capital offense be presented against *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of the witnesses they are dissatisfied, they may return the bill *ignoramus*.

If *A.* be killed by *B.* so that it doth *emphatically* *de persona occisi & occidentis*, and a bill of murder be presented to them, [158] regularly they ought to find the bill for murder, and not for manslaughter, or *se defendendo*, because otherwise offenses may be smothered without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many cases it is a great disadvantage to the party accused (*). For if a man kills *B.* in his own defence, or *per infirmum*, or possibly in executing the process of law upon an assault made upon him, or in his own defence upon the highway, or in defence of his house against those that come to rob him (in which three last cases it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted), yet if the grand inquest find an *ignoramus* upon the bill,

(a) This same doctrine is laid down by C. J. *Pemerton*, in the case of the *Earl of Shaftsbury*, *State Tr. Vol. III. p. 415*. *Vide* *tauxem* Sir *John Hales*'s remarks on that case, *State Tr. Vol. IV. p. 183*, wherein he unambiguously decides, that a grand jury ought to have the same possession of

the truth of the indictment, as a petty jury, on a coroner's inquest: *vide supra*, p. 151.

(*) Notwithstanding this, according to Lord Chief, of *Co. 119. a.* in indictments, wherein concern the life of a man, ought to be made as near the truth as may be.

or find the special matter, whereby the prisoner is dismissed and discharged, he may nevertheless be indicted for murder seven years after.

But if the grand jury had found the bill for murder (yea or for manslaughter), and the party pleading not guilty, the special matter is given in evidence, and the petty jury find the special matter; (or in the three last cases find him not guilty, as they may) this acquittal upon this finding will be a good plea of *autrefois acquit*, and he shall never be arraigned for it again.

If a bill be against *A.* for murder, and the grand inquest upon the evidence before them, or their own knowledge be satisfied that it was but *per infortunium*, or *se defendendo*, and accordingly return the bill specially, the court may remand them to consider better of it, or may hear the evidence at the bar, and accordingly direct the grand inquest; but I have known a judge blamed for setting a fine upon the grand inquest for such a return, because in truth it comes not up to felony.

But if a bill goes out against *B.* for murder, and it doth *constare de persona occidentis*, may the grand inquest find the bill for manslaughter, and *ignoramus* for the murder? and is the court bound to receive such a return?

[159] In this case, of all hands it is agreed (*b*), that the grand jury is to blame, because they take upon them to anticipate the evidence that is to be given to the petit jury, and so determine matter of law, which belongs to the court to determine, and by this means many murders may escape under the disguise of manslaughter, and so escape with their clergy.

Some therefore have made it a practice to set a fine upon the grand jury in this case, and it hath proceeded so far, as to fine petit juries also in such like cases; whereof hereafter.

That which I think herein, and in other concealments of grand inquests, is as follows, *viz.*

1. That the court may receive such a return from the grand inquest, and it is a matter of discretion, especially, if upon inquiry from the

(*b*) This is far from being agreed of all hands, for such an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oath as much as the petit jury, to *present the whole truth, and nothing but the truth*; nor do they in this case so properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which tho it is to be presumed, where no provocation appears, is matter of

fact, and proper for the consideration of a jury; and tho judges have sometimes fined jurors for not finding such bills for murder, yet such proceedings have been generally censured, as in the case of Sir *H. Wyndbam*, and others, *P. 19. Car. 2.* who were fined by *Keeling, C. J.* for not finding a bill of murder, albeit they were satisfied the man died by the hand of the party indicted; but upon complaint in parliament, the chief justice was said to submit. *2 Keb. 180.*

indictors or witnesses, or upon view of their examinations it doth plainly appear, that the crime amounts to no more

2. That barely upon such a return no fine can be set upon the grand inquest, unless the evidence to the grand inquest be given at the bar in the presence of the court; for otherwise the court cannot understand, whether the grand inquest doth well or ill in such case.

3. That if the evidence to the grand inquest be given at the bar upon an indictment in the king's bench, and the grand inquest will not find a bill according to the direction of that court; as for instance, will find a man guilty only *se defendendo*, or of manslaughter, when it is murder, that court may set a fine upon the grand inquest, and so it hath been practised; for it is the highest court in *England* of ordinary justice, especially in criminal causes.

4. That if the justices of *oyer* and *terminer*, or gaol-delivery [160] having heard the evidence at the bar, the grand inquest will not find according to their directions, the justices may bind them over by recognizance into the king's bench, and upon an information against them they may be fined.

5. That in such a case justices of peace, *oyer* and *terminer*, or gaol-delivery may, according to the statute of 3 *H. 7. cap. 1.* impanel another inquest to inquire of their concealments, and thereupon set fines upon them.

6. But in my opinion fines set upon grand inquests by justices of the peace, *oyer* and *terminer*, or gaol-delivery for concealments or non-presentments in any other manner, are not warrantable by law; and tho the late practice hath been for such justices to set fines arbitrarily, yea not only upon grand inquests, but also upon the petit jury in criminal causes, if they find not according to their directions, it weighs not much with me for these reasons; 1. Because I have seen arbitrary practice still go from one thing to another, the fines set upon grand inquests began, then they set fines upon the petit juries for not finding according to the directions of the court; then afterwards the judges of *nisi prius* proceeded to fine jurors in civil causes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of assize (*c*), in *Oxfordshire*, and the fine estreated; but I, by the advice of most of the judges of *England*, staid process upon that fine; the like was done by the same judge in a case of burglary, the fine was estreated into the *Exchequer*; but by like advice

(c) Justice *H. de t. Oxfrd. Vaugh.* 115.

I stayed process; and in the case of *Wagstaff* (*d*), and other jurors fined at the *Old-Bailey*, for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one dissenting), it was ruled to be against law: but of this hereafter (*e*). 2. My second reason is, because the statute of 3 *H.* 7. *cap.* 1. prescribes a way for their fining, which would not have been, if they had been arbitrarily subject

[161] to a fine before. 3. It is of very ill consequence, for the privilege of an *Englishman* is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safe-guard, if every justice of peace, or commissioner of *oyer* and *terminer*, or gaol-delivery, may make the grand jury present what he pleases, or otherwise fine them; and there is no parity of reason or example between inferior judges and the court of king's bench, which is the supreme ordinary court of justice in such cases; and thus far concerning fining of grand inquests (*f*).

They are sworn to keep the king's counsel undiscovered, the revealing or disclosing whereof was heretofore taken for felony, 27 *Aff.* 63. but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, tho some of the rest of their number dissent, it is a good presentment; for if twelve agree, it is not necessary for the rest to agree. *Lamb. Justice* 400.

But in case of a trial by the petit jury, it can be by no more nor less than twelve, and all assenting to the verdict (*g*), accordingly it was adjudged; *M.* 42 *E.* 3. *Rot.* 16. *Suff. Rex.* (*h*), the judgment was reversed, because but eleven indictors.

But

(*d*) *Par.* 1. 159.

(*e*) *Cap.* 42.

(*f*) The court of king's bench, it is true, may much more safely be trusted, than other inferior courts, but yet our author's arguments do sufficiently convince, that no court whatever ought to have such a power of making justice and what they please, nor has the law vested such a power in any court; for as to matters of fact, the jury are the judges, and herein are to be guided entirely by their own judgments and consciences; indeed in matters of law, the court is the proper judge, and the jury are not to find contrary to their direction; but even here they are not bound to follow the direction of the court, but if they cannot follow therein, ought to find the fact *ipso facto*, and if the fact is agreed, it may still continue to find matters of law

contrary to the direction of the court, there may be some reason why they should be fined, See *Hood's* case, *Kel.* 81. 52. but barely finding matter of fact against the direction of the court, is no sufficient cause to fine a jury, *Bushell's* case, *Faugh.* 153. and this distinction is founded on the ancient maxim of the common law; *ad questionem juris non respondent iuratores, sed iudices; ad questionem facti non respondent iudices, sed iuratores.* *Co. Lit.* 9. 366. & *liber* 111.

(*g*) See the inconveniencies hereof, *Pres.* to *State Tr.* p. 7.

(*h*) This case proves nothing as to the petit jury, it being an indictment on the coroner's inquest, as appears by the record, which is as follows: "John Cobat of Ipswich, was indicted by the coroner's inquest, consisting only of eleven, quod die Sabbati

But if a presentment be delivered into a court of sessions, and received, no amercement lies, that it was not assented to by twelve, but otherwise it is in case of a presentment by a jury, for the party distrained, &c. may aver that it was not presented by twelve. 45 E. 3. 26. b. B. Lect 7.

The indictors are presumed in law to be indifferent, unless the contrary appear; 1. Because returned by the sheriff. 2. Because sworn by the court to present, and therefore shall never be charged by writ of conspiracy for any conspiracy before their being sworn, tho the party be acquit. 7 H. 4. 31. b. 19 H. 6. 19. a. But 21 E. 3. 17. by R. Th. it is a good replication to say, he procured himself to be returned of the grand inquest.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manslaughter, & *ignovimus quoad* murder, the usual course is in the presence of the grand jury to strike out *malitiose & ex malitia sua præcogitata* and *murderavit*, and leave in so much as makes the bill to be but bare manslaughter, and so to receive it.

But the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*; for the words of the indorsement make not the indictment, but only evidence the assent or dissent of the grand inquest, it is the bill itself is the indictment when affirmed. And so in like cases, where the bill contains two offenses, as burglary and theft, forcible entry and detainer. H. & Jac. B. R. *Yelverton* 99. *Ford's* case.

The grand jury are sworn *ad inquirendum pro corpore comitatus*, and therefore regularly they cannot enquire of a fact [163] done out of that country for which they are sworn, unless specially enabled by act of parliament; but only in some special cases. *M. L. & Car. B. R. Bell's* case.

"Sabbati prox' ante festum Sancti Petri ad
"vincula anno regni regis, E. 3. post con-
"quatum tricesimo quinto insultum fecit
"Johanni le Secon servienti Prioris sancte
"Trinitat. Gypswici in subarbio libertat'
"ille prædixit in quodam campo juxta
"Tremont' H. & dictum Johannem le
"Secon ibidem cum quadam armâ vocat'
"Searre' precii quatuor denar. ve benavit
"selon' de quâ quidem verberatione dictas
"Johannes le Secon moriebatur, sed lan-
"quebat à dicto die Sabbati prox' ante festum
"Sancti Petri ad vincula usque ad diem
"jovis tunc prox' sequent';" the writ in-
"dictment was afterwards in *M. L.* term
"anno 32 of the same reign removed into the
"king's bench, " & continuato inde processu

"versus præf' Johannem usque à die Pas-
"che in xv dies anno regni regis nunc
"Anglie quadragesimo tertio, ad quem
"diem coram domino regi apud *Winton'*
"venit prædictus Johannes *libert* per man'
"& viro & dilig' utro examinato per cor'
"iudicamentis predictis, pro eo quod
"compert, est in eodem, quod fuerunt mi-
"serandem juratores tantum in inquisitione
"predictâ, ubi in qualibet inquisitione de
"jure fore deberent xii jurati, & sic vide-
"tur cur', quod indictmentum predictum
"minus sufficiens est ad præf' Johannem
"Cohat ulterius inde ponere respondit.
"Ideo idem Johannes Cohat ad præfens eat
"inde sine die, salvo semper jure regis,
" &c."

If a man had been stricken in the county of *A.* and had died in the county of *B.* the offender had not been indictable of murder, &c. in the county of *A.* because the death was in the county of *B.* neither had he been indictable in the county of *B.* because the stroke was given in the county of *A.* but by the statute of 2 & 3 *E.* 6. *cap.* 24. he may be indicted in the county where the party died, tho the stroke were in another county; and also the offender shall be tried there, but an appeal may be brought in either county. 7 *Co. Rep.* 2. *a. Bulwer's case.*

So if *A.* had committed a felony in the county of *D.* and *B.* had been accessary *before* or *after* in the county of *C.* *B.* could not have been indicted as accessary in either county at common law, but by that statute he is indictable, and shall be tried in the county where he so became accessary. *Stamf. P. C. Lib.* I. *cap.* 46.

So if a stroke were given *super altum mare*, and the party came into the body of the county, and there died, this is *casus omiffus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral, by the statute of 28 *H.* 8. *cap.* 15. *Co. P. C. cap.* 7. *p.* 48.

If *A.* robs *B.* in the county of *C.* and carries the goods into the county of *D.* *A.* cannot be indicted of robbery in the county of *D.* because the robbery was in another county; but he may be indicted of larceny or theft in the county of *D.* because it is theft wherever he carries the goods; the like law in an appeal, 4 *H.* 7. 5 *b.* 7. *Co. Rep.* 2. *a. Bulwer's case.*

But by the force of some acts of parliament, treasons and felonies committed in one county may be indicted and tried in another county.

By the statute of 33 *H.* 8. *cap.* 23. upon examination, as in that [164] statute is provided, treasons, misprisions of treasons, and murders committed in any place within the king's dominions, or without, may be enquired of, heard and determined, in any county where the king by his commission shall appoint.

This statute, at least as to the trial of treasons and misprisions, is repealed by the statute of 1 & 2 *P. & M. cap.* 10. *Stamf. P. C. Lib.* II. *cap.* 26. *fol.* 89, 90. *Co. P. C. cap.* 2. *p.* 27.

But it seems *that* statute stands in force as to indictments and trials of murder, the circumstances required by that statute being observed.

By the statute 35 *H.* 8. *cap.* 2. because some doubt was conceived, whether foreign treasons committed out of this realm might be enquired of,

of, heard and determined within the realm, it is enacted, that such offences shall be enquired of, heard and determined in the king's bench, or in such counties where the king shall issue his commission by the good men of the same county.

This statute stands in force, not repealed by 1 & 2 P. & M. cap. 10. Co. P. C. cap. 2. p. 24.

By the statute 27 Eliz. cap. 2. treasons by priests or jesuits coming into *England*, and felony for receiving them; and by the statute 1 Jac. cap. 11. felony for taking a second husband or wife, the first living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools, by the statute of 14 Car. 2. cap. 18. But yet it was held at common law, that treason in adhering to the king's enemies beyond the sea, was inquirable and triable where the offender had lands, *vide Coke super Littleton, Sect. 440. p. 261. b. 5 R. 2. Trial 54.* but this is now settled by the statute of 35 H. 8. cap. 2 *vide Co. P. C. cap. 1. p. 11.*

If *A.* by reason of tenure of lands in the county of *B.* be bound to repair a bridge in the county of *C.* if the bridge be in decay, he may be indicted in the county of *C.* that he is bound *ratione tenuræ* of lands in the county of *B.* to repair the bridge. 5 H. 7. 3. 3 E. 3. *Affise* 446.

4 Blackf. Com. ch. 23. p. 303. Burn. tit. Jurors. Index to 2 Hawk P. C. tit. Jurors.

C H A P. XXIII.

[165]

Concerning the forms of indictments in cases capital, and first touching the form of the caption returned upon a certiorari.

IT will be a business of too much length, and besides my intention to treat of all indictments in cases of criminal, but I shall confine myself only to those that are capital.

Touching the forms of indictments, there are two things considerable: 1. The caption of the indictment: 2. The indictment itself.

The caption of the indictment is no part of the indictment itself, but it is the style or preamble, or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove; or when the whole record is made up in form, for whereas the record of

the indictment, as it stands upon the file in the court, wherein it is taken, is only thus: *Juratores pro domino rege super sacramentum suum præsentant*, when this comes to be returned upon a *certiorari* it is more full and explicate, *viz.* in this form:

Norff. *Ad generalem sessionem pacis tent' apud S. in comit' prædicto 5 die Octobris anno regni, &c. 25 coram A. B. C. D. & sociis suis justiciariis domini regis ad pacem dicti domini regis in comit' prædict' conservand', necnon ad divers' felonias transgress' & alia malefacta in eodem comitat' audiend' & terminand' assignatis. per sacrament' E. F. G. H. &c. proborum & legalium hominum comit' prædict' jurat' & onerat' ad inquirend' pro dicto domino rege & pro corpore comit' prædict' existit præsentatum.*

[166] 1 First, The name of the county must be in the margin of the record, or repeated in the body of the caption.

2. The court where the presentment is made, must be expressed, *viz. ad generalem sessionem pacis, &c.* or *ad generalem goalæ regis de liberationem, &c.*

3. It must appear where the session was held, and that the place where it was held is within the extent of the commission, and therefore if *Dorset* be in the margin, and the caption be *ad generalem sessionem pacis tent' apud S.* and says not *in comitat' prædicto*, it is nought, *H. 42 Eliz. B. R. Ludlow's case, Croke, n. 10. p. 738. P. 40. Eliz. B. R. Croke, n. 4. p. 606. Child's case*; so if *west-riding in comit' Eborum* be in the margin, and caption be *apud S. in comit' prædicto*, it shall be quashed, because it doth not say *apud S. in west-riding in comitat' prædict'* *T. 5 Jac. B. R. and P. 9. Jac. B. R. Thorny's case, Croke, n. 6. p. 276.*

4. The justices names, *H. 42 Eliz. B. R. Ludlow's case.*

But it is not necessary to name all the justices by name, but the rest may be supplied by the words (*& sociis suis, &c.*) But so many are fit to be named as are enabled by their commission to hold a session, and the return of the caption is supposed to agree with the title of their sessions.

5. The title of their authority, as *justic' ad gatlem domini regis com' prædict' deliberand'.*

And note, that if there be a session by three commissions, as of *gaol-delivery, oyer and terminer*, and the peace, if it be returned at a session

session holden before them, and the record be made up, as upon all three commissions, if they have jurisdiction to take the indictment, but by one of those, it is good, tho not enabled to take it by the other. 9 H. 7. 9. a.

Tent' coram justiciariis ad pacem, without saying *neon ad divers' felencias, &c. audiend' & terminand' assignatis*, is not good to remove an indictment because tho that clause be usually added to all commissions of the peace, yet there are not thereby justices of *oyer and terminer*, and that clause ought to be added to their return, because without that clause they cannot proceed by indictment. 22 E. 4. 12. b. 2 R. 3. 9. a. b.

And altho in all commissions of *oyer and terminer*, gaol-delivery, and of the peace, there be some that are of the [167] *quorum*, without which there can be no session held, yet in the caption there need not be any mention, whether any of them, or which of them are of the *quorum*, but generally as before, for it is sufficient, if *de facto* the session be held before him or them that are of the *quorum*, tho not so mentiond in the return, and so is the usual course.

But it seems, that if an act of parliament doth expressly limit, that such or such an offense shall be heard and determined before two or more justices of the peace, &c. whereof one to be of the *quorum*, the caption of such an indictment of such an offense ought to mention, whereof *A. &c.* is of the *quorum*, as is used in the return of orders made by two justices touching bastard children upon the statute of 18 Eliz. cap. 3. because the act of parliament precisely limits one to be of the *quorum*, and therefore must be pursued.

6. It must return, that the indictment was made *per sacramentum*.

7. It must name the jurors that presented the offense, and therefore a return of an indictment or presentment *per sacramentum* A B. C. & D. & *aliorum* is not good, for it may be the presentment was by a less number than twelve, in which case it is not good. H. 41 Eliz. B. R. *Croke*, n. 16. *Clyward's case*, p. 654. and it seems to me, that all the names of the jurors ought to be returned; for the party indicted may have an exception to some or one of them, as that he is outlawed, in which case the indictment may be quashed by plea, tho there be twelve besides without exception; for possibly that one, who is not *legalis homo*, may influence all the rest, and so vitiate the whole indictment.

8. They

8. They must be returned to be *probi & legales homines*, and *de comitatū prædicto*, and this holds as well in the case of the coroner's inquest, as of other indictments or presentments. *P. 20 Jac. B. R. Croke 2. Oily's case, p. 635.*

9. It seems requisite also to add this clause, *onerati & jurati ad inquirendum pro domino rege & pro corpore comit' prædict'*; and if it be [168] a presentment by the grand jury of a liberty, *ad inquirend' pro domino rege & pro libertate de S. vel rapā de S.*

10. If it concludes *qui dicunt*, and says not *super sacrament'*, &c. or *præsentatum existit*, and says not *per sacramentum*, &c. *præsentatum existit*, it shall be quashed, for their presentment must be upon oath, and so returned; so ruled *T. 23 Car. 1. B. R.*

And thus far for the caption of the indictment, where, *note 1.* That if the caption be faulty in the form, yet the same term it may be amended by the clerk of the assises, or the peace, but not in another term.

2. But in another term, the clerk that returns it shall be fined for his informal return,

C H A P. XXIV.

Concerning the body of the indictment in cases capital, and the several parts thereof, and the forms requisite therein.

THIS is a large and uncertain title, and hard to be reduced to any certain orders; 1. Because the parts of an indictment are many. 2. The strictness required in indictments is great, because life is in question. 3. Therefore very nice and slender exceptions have been of latter ages allowed, and they have been with too much facility quashed and reversed. 4. The circumstances of facts and crimes are very various.

Yet I shall endeavour to reduce this title to as much certainty, and as good a method as I can, confining myself to capital causes, tho there be many things that will arise equally applicable to causes of an inferior nature.

[169] An indictment is nothing else but a plain, brief, and certain narrative of an offense committed by any person, and
of

of those necessary circumstances, that concur to ascertain the fact and its nature; and therefore I shall consider 1. Some generals, that concern indictments in general. 2. I shall consider the several parts of indictments in their order,

Among these generals these will come to be considered, that follow.

I. Regularly, every indictment ought to be in *Latin*, as all pleadings in the courts of law ought to be, and it is of excellent use, because it being a fixed, regular language, it is not capable of so many changes and alterations, as happen in vulgar languages. (a)

If there be a proper *Latin* word for any offense or thing contained in an indictment, it may not be supplied with general words, and an *Anglicè*.

Therefore an indictment, *quòd exercuit quasdam diabolicis artes*, *Anglicè* witchcraft, was quashed, because there is a proper *Latin* word for it; viz. *Incantatio*. *M. 2 Car. B.* Dr. Lamb's case. (b)

Regularly, false *Latin* doth not vitiate an indictment, if yet the indictment be reasonably intelligible, 5 *Co. Rep.* 121. a. Long's case, *AI. 30 & 31 Eliz. Croke, n. 3. B. R.* Brickett's case, (c), as *præfato reginæ*, where it should be *præfatæ*.

But if the words be words of art, and by omission or misplacing of letters become insignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonice*, *murdredavit* for *murdravit*; but *burgulariter* hath been held good, 4 *Co. Rep.* 39. b. Brook's case, *ibid.* 41. b. Haydon's case, 5 *Co. Rep.* 121. a. Long's case. *H. 45 Eliz. B. R. Croke, n. 15. Ryle's case.* (d)

So if it make the indictment insensible or uncertain, as if *A.* and *B.* be indicted for stealing, *felonice cepit & asportavit*, [170] where it should be *ceperunt*, it shall be quashed, *P. 42 Eliz. B. R.* Lane's case (e); so in an indictment of murder, the stroke laid in *sinistro bracio*, where it ought to be *brachio*, for it appears not where the wound was, the words being insensible. *T. 31 Eliz. B. R.* Webster's case. (f)

(a) This is now altered by 4 *Geo. 2. cap. 26.* 6 *Geo. 2. cap. 6.* which requires all indictments, &c. to be in the *English* tongue; for notwithstanding the excellency of the use here mentioned by our author, it was thought to be of much greater use and importance, that they should be in a language capable of being known and understood by the parties concerned, whose

lives and liberties were to be affected thereby.

(b) *Noy 85. Lamb. 156. W. Jones 143.*

(c) *Cro. Eliz. 108.*

(d) *Cro. Eliz. 920.*

(e) *Cro. Eliz. 754.*

(f) By the name of *Glen's case* *Cro. Eliz. 137.*

Abbreviations, that are usual, are allowable in indictments, as well as in other pleadings, and shall be construed to the best advantage for the maintaining of the indictment, as if an indictment be maintainable upon one statute or more, a conclusion *contra formam statuti. in hujusmodi casu edit. & provis.* shall be construed singularly or plurally, as makes best for the maintenance of the indictment. (g)

Figures to express numbers are not allowable in indictments; tho sometimes literal numbers be allowable in returns, but in indictments the numbers, whether cardinal or ordinal, must be expressed in *Latin*.

II. An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament, and those circumstances mentiond in the statute to make up the offense shall not be supplied by the general conclusion *contra formam statuti*.

And so it is, if an act of parliament oust clergy in certain cases, as murder *ex malitiâ præcogitatâ*, robbery in or near the highway, stabbing one not having struck first, nor having a weapon drawn, tho the offenses themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, tho convicted, unless these circumstances, as *ex malitiâ præcogitatâ*, or *prope altam viam*, &c. be expressed in the indictment.

But where an offense is made felony, or otherwise punishable by act of parliament, tho the indictment must take in the circumstances, which in the body of the act make up the offense, yet if by a proviso [171] in the same statute, or by any subsequent statute some cases or circumstances are exempted out of the act, the indictment need not mention and qualify the offense, so as to exempt it out of the proviso, but the party shall have advantage of the proviso by pleading *not guilty*, and in the same manner shall have advantage of the subsequent statute to excuse him by virtue of the statute of 21 *Jac. cap. 4*.

If a statute prohibit any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not indictment, the party may be indicted upon the prohibitory clause, and thereupon fined, but not to recover the penalty, as upon the statute of 3 *Jac. cap. 5*. prohibiting recusants to baptize their children by a popish priest. *H. 7 Car. B. R. per Cur'*, but

(g) This is also altered by 4 *Geo. 2. cap. 26.* 6 *Geo. 2. cap. 6.* which prohibits all abbreviations in indictments, &c.

then it seems the fine ought not to exceed the penalty, *P. 22 Car. B. R. College of Physicians, vide tamen M. 20 Jac. B. R. Croke, n. 4. Castle's case contra. (h)*

But if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit *5 l.* to be recovered by action of debt, bill, plaint, or information, he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. *P. 6 Car. B. R. Day's case.*

If a man be indicted for an offense, which was at common law, and concludes *contra formam statuti*, but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offense at common law.

As if a man be indicted for drawing his dagger in the church upon *J. S. contra formam statuti, viz. 5 E. 6. cap. 4.* but omits these words *with an intent to strike*, the indictment shall be quashed, and the party not put to answer the assault at common law. *P. 33 Eliz. B. R. Croke, n. 23. Penhall's case. (i)*

So if a man be indicted for a riotous and forceable entry *contra formam statuti, viz. 8 H. 6. cap. 9.* and the statute is misrecited, he shall not be put to answer the offense at common law, but the indictment shall be quashed. *M. 35 & 36 Eliz. B. R. [172] Croke, n. 10. Hall and Gaven (k), M. 41 Eliz. B. R. Croke, n. 10. Eden's case (l) yet vide M. 10. Car. Holme's case. (m)* A man indicted for felonious turning of a house, upon *not guilty* pleaded a special verdict was found, it was adjudged no felony, as the case was found, yet upon the same indictment he was adjudged to the pillory, and fined *500 l.* and bound to his good behaviour, but *quære* of that case, for it seems unreasonable, because being tried for felony, he hath not those advantages for his defense, as if he were indicted only for trespass; *(n) M. 10 Car. B. R. Croke, n. 3. vid. 2 H. 7. 10. b.*

If a statute be particular, it must be recited in the indictment, and proved by an examined copy upon the trial.

But if a man be indicted *quid furatus est*, and says not *felonice*, this indictment imports but a trespass, and the offender may be put to answer it as a trespass. *2 H. 7. 10. b. 18 E. 4. 10. b.*

(h) Cro. Eliz. 644.

(i) Cro. Eliz. 231.

(k) Cro. Eliz. 377.

(l) Cro. Eliz. 677.

(m) Cro. Car. 376.

(n) For instance, he could not have the assistance of counsel.

And so it seems, if a man be indicted at a leet, *quod felonice rapuit* such a woman, and this indictment is removed into the king's bench; because the leet hath no jurisdiction to take an indictment of rape as a felony, he shall not be put to answer it as a felony, but shall be fined as for a trespass, because as a trespass the leet may enquire of it. 6 H. 7. 5. a.

If it be a general statute, it need not be recited, but it is sufficient to conclude *contra formam statuti in hujusmodi casu edit' & provis'*, for the court ought to take notice of it, and all penal statutes, that induce a forfeiture to the king, or make a felony or treason are general statutes, because it concerns the king; but if a general statute be recited in an indictment, and be misrecited in a point material, and conclude *contra formam statuti prædicti*, it is fatal, and the indictment shall be quashed, but it seems, that if it conclude generally

[173] *contra formam statuti in hujusmodi casu edit' & provis'*, it is good, for the court takes notice of the true statute, and will reject the misrecital as surplusage. M. 7 Car. B. R. Croke, n. 14. Barn's case (o) in maintenance, and M. 8 Car. B. R. per Jones *super stat. de cottages* (p).

1. If an act of parliament making a felony or other offense be but temporary, and made perpetual by another statute, the indictment concluding *contra formam statuti* is good.

2. If the former statute be discontinued, and revived by another statute, the best way is to conclude *contra formam statutorum*, M. 31 & 32 Eliz. B. R. Mill's case, tho there is good opinion, that it is good enough to conclude *contra formam* of the statute, as in case of the statute of 5 E. 6. of ingrossing, 37 H. 8. for usury, and 5 Eliz. for perjury, which were discontinued and revived, yet the indictments good concluding *contra formam* of the first statute. T. 9 Jac. Rot. 124. C. B. Westwood's case.

3. If one statute be relative to another, as where the former makes the offense, the latter adds the penalty, as the statutes of 1 and 23 Eliz. the indictment ought to conclude *contra formam statutorum*. P. 42 Eliz. B. R. Croke, n. 6. Dingly and Moore (q).

III. Touching the joining of persons and offenses in one indictment.

(o) Cro. Car. 232.

(p) 31 Eliz. cap. 7.

(q) Cro. El. 750.

If there be one offender and several capital offenses committed by him, they may be all contained in one indictment, as burglary, and larciny: Larcinies committed of several things, tho at several times, and from several persons, may be joined in one indictment.

If there be several offenders, that commit the same offense, tho in law they are several offenses in relation to the several offenders, 21 E 4. yet they may be joined in one indictment, as if several commit a robbery, or burglary, or murder.

And so it is, if the offenses are of several degrees, but dependent one upon another, as the principal in the first degree, and the principal in the second degree, viz. *present, aiding, and abetting* the principal, and accessory before or after.

[174] IV. Touching the joining of several offenses of the same nature, but distinctly committed by several offenders, some have been ruled insufficient, as an indictment of several persons, *quod non escourarunt fossata separalia ante separalia sua pomaria*, quashed in 23 Car. 1. B. R. so of several officers, *quod colore separaliū officior' suorum separalitèr extorsivè ceperunt*, &c. M. 33 & 34 Eliz. B. R. *Lake's case* in *Hughe's Rep.* and so if two are indicted for using a trade not being bound apprentice, it is not good. P. 16 Car. 1. B. R. *Brooke's case* (r).

But yet in 21 T. 21 Jac. B. R. *A. B. C. and D.* were indicted for erecting four several inns *ad commune nocumentum*, it was ruled, that for several offenses of the same nature several persons may be indicted in the same indictment, but then it must be laid *separalitèr crexerunt*, and for want of that word (*separalitèr*) the indictment was quashed.

And it is common experience at this day, that twenty persons may be indicted for keeping disorderly houses, or bawdy-houses, and they are daily convict upon such indictments, for the word *separalitèr* makes them several indictments.

(r) 2 R. A. 78. pl. 6.

C H A P. XXV.

Concerning the forms of indictments in particular, and the several parts thereof.

THE most considerable parts of an indictment in capital offences are, 1. The name and addition of the party offending. 2. The day and time of the offense committed. 3. The place where it was committed. 4. Upon or against whom committed. 5. The manner of the commission of it. 6. The fact itself and the nature of it. 7. The conclusion.

This is the grammatical order, wherein things are set down [175] in the indictment, and upon these parts most of the considerations and observations touching indictments do arise, and those that are not reducible to these heads, are partly observed before, and shall be more fully prosecuted in the end of this chapter.

I. As to the name and addition of the party indicted, this regularly ought to be inserted, and inserted truly in every indictment.

But if the party be indicted by a wrong christian name, surname, or addition, and he plead to that indictment *not guilty*, or answers to that indictment upon his arraignment by that name, he shall not be received after to plead *misnomer*, or falsity of his addition, for he is concluded and estopped by his plea by that name, and of that estoppel the gaoler and sheriff, that doth execution, shall have advantage.

M. 16 Jac. and P. 17 Jac. B. R. Debt was brought against Sir Francis Fortescue knight and baronet, and he appeared; and judgment given against him, ruled 1. That he shall never assign for error, that he was no baronet, tho baronet be parcel of the name. 2. If execution be sued against him by the name of Sir Francis Fortescue knight and baronet, and he brings false imprisonment against the sheriff, the sheriff shall have advantage of this estoppel, adjudged (a).

Therefore he, that will take advantage of the *misnomer* of his christian name, addition, or surname, must do it upon his arraignment, and the entry must be special, *viz. super quo venit Robertus*

(a) 2 Rol. R. p. 50, 83.

Williams, *qui indictatus est per nomen Johannis Williams, & dicit quòd ubi in indictamento supponitur, quòd quidam Johannes Williams vi & armis, &c. ipſus nomen est Robertus & non Johannes*; for, if he should say *venit prædictus Johannes Williams*, he concludes himself, and cannot plead, that is name is *Robert*, and so I have known it ruled against the book of 1 E. 4. 2. b.

The misnaming of the surname of the offender in an appeal is a good plea in abatement, but tho the surname be mistaken in an indictment, yet it shall not abate. 1 H. 5. 5. b. *per Hank-* [176]
ford. Stamf. P. C. Lib. III. cap. 18. tamen quere.

But the mistake of the christian name is pleadable, as well in case of an indictment, as an appeal, and the party shall be dismissed from that indictment. 11 H. 4. 41. b. *Coron. 88. Stamf. P. C. ubi supra*, but by *Rolf* 3 H. 6. 26. a. it is no plea in an indictment (b).

But the safest way is to allow his plea of *misnomer* both as to his surname and as to his christian name, for he that pleads *misnomer* of either, must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself.

By the statute of 1 H. 5. cap. 5. in all indictments, &c. the party indicted ought to have the addition of his mystery, degree, place, and county.

Therefore, if the party indicted have no addition, or a false addition, he may upon his arraignment except to the former, and plead to the latter.

And if he be outlawed upon such indictment, where there is no addition, or a false addition, he may avoid it by a writ of error, &c.

But altho there be no addition, yet if he appear, and plead not guilty without taking advantage of that defect, he shall never allege the want of addition to stop his trial or judgment, for by such his appearance and pleading to issue the indictment is affirmed, and the want of addition salved, and the statute satisfied. H. 18 Jac. B. R. *Croke*, n. 5. *Johnson's case* (c), adjudged.

The addition required by the statute is of his degree, as *Yeoman, Gent, Esq*; of his mystery, as *husbandman, sailor, spinster, &c.* therefore, if the addition be only general, as *servant, farmer, citizen*, 9 E.

(b) The words of the book are, *it is no plea in felony.*

(c) *Cro. Eliz. 6c9.*

4 48. *a.* or of crimes or misdemeanors only, as extortioner, vagabond; heretic, 22 *E.* 4. 1. *a.* these are no good additions.

[177] The addition ought to be to his substantive name, not only to the *alias dictus*. *M.* 33 & 34 *Eliz.* *Croke*, n. 11. *Leke's* case (*d*) as *A. B. alias dictus A. C. butcher*, because regularly the addition refers to the last antecedent, and upon the same reason it is, if the indictment run *Sibilla B. nuper de C. uxor Johannis B. nuper de C. spinster*, because *spinster* is an addition applicable to the husband, as well as to the wife; but an indictment of *John B. vir*, *Emelin B. nuper de C. yeoman* is good, because *yeoman* is not applicable to a woman, but to a man. *P.* 31 & 32 *H.* 8. *Dyer* 46, 47. adjudged, and 4 *H.* 6. 4. *b.*

Single woman is a good addition, 14 *E.* 4. 7. *b.* so is *widow*, 10 *H.* 6. 21. *a.* so is *uxor J. S.* adjudged, *P.* 42 *Eliz.* *B. R.* *Eleanor Gower's* case.

An indictment against a peer of the realm is good without an addition, because no process of outlawry lies against him. *M.* 31 & 32 *Eliz.* *B. R.* *Croke*, n. 15. Lord *Dacre's* case (*e*).

If several persons be indicted for one offense, *misnomer* or want of addition of one quasheth the indictment only against him, and the rest shall be put to answer, for they are in law as several indictments, and so in trespass. 7 *E.* 4. 10. *b.*

Because the titles of *misnomer* and addition are general titles, whereof much is said in our books, as well in cases of civil suits as indictments, this shall suffice in this place touching this part of the indictment.

II. Touching the time, *viz.* the year and day, wherein the fact was committed; this is necessary to be contained in the indictment.

Tho the day be inserted, but not the year, the indictment is insufficient, and it shall not be supplied by intendment of (*ultimo præterito*;) unless it be so express, but if it be so express, it is sufficient in ascertaining the year by the day of the sessions. *Lamb.* 49.

If the sessions be held the 20 day of *May*, and the indictment suppose the offense to be the 10 day of *Maii ultimi præteriti*, it [178] relates to the month, if *ultimo præterito* it relates to the day by the necessary grammatical construction, but if it be *ult' præterit'* with an abbreviation without the termination of the genitive or ablative case, it shall relate to the day, *viz.* the 10th day of the same *May*, as if it were in *English* the 10th day of *May* last past, it re-

(d) *Cro. Eliz.* 249, 198.

(e) *Cro. Eliz.* 248.

lates to the day and not to the month regularly, and so for the words next ensuing, *vide P. 23 Eliz. B. R. Rot. 39. b. Sir Richard Shuttleworth's case, M. 21 Jac. B. R. Croke, n. 14. Buckley's case (f).*

If *A.* be indicted, that he *in festo Sancti Petri anno 20 Car.* kild *J. S.* this is not good, because there be two feasts of *St. Peter*, and neither without addition. *3 H. 7. 5. b. viz. St. Peter ad vincula, and St. Peter in cathedra.*

If *A.* be indicted, *quod primo die Maii & secundo die Maii apud D.* he made an assault upon *B.* & *quandam togam ipsius B. adtunc & ibidem invent' felonice cepit, &c.* this indictment is not good, because there are several days mentiond before, and it is uncertain to which the felonious taking shall relate. *2 H. 7. 7. b. & 10 b.*

A. is indicted, *quod primo die Maii anno 21 Eliz. in quendam B. insultum fecit & ipsum verberavit,* and says not *adtunc & ibidem verberavit,* yet ruled good, for the *vi & armis,* day and place named in the beginning refer to all the ensuing acts. *5 H. 7. 17. b.*

But in an indictment of felony there must be *adtunc & ibidem* to the stroke or to the robbery, and the day and place of the assault is not sufficient*, and this is *in favorem vite.* *P. 43 Eliz. B. R. Richardson's case.* And therefore it is usual to repeat the *adtunc & ibidem* to the several parts of the fact, as in larciny or robbery from the person, *quod A. B. die, &c. anno, &c. apud, &c. in quendam C. D. insultum fecit, & bona & catalla ipsius C. D. scilicet unam togam ad valenc', &c. adtunc & ibidem inventam adtunc & ibidem felonice cepit & asportavit;* *A.* is indicted, *quod primo die Maii anno 2 Eliz. apud C. habens in manu sua dextra gladium, &c. percussit B.* and it is not said *adtunc & ibidem percussit* quashed, because the day and year, and place relate only to the having of [179] the sword, not to the stroke. *H. 42 Eliz. Croke, n. 11. Cotton's case (g).*

If *A.* be indicted of murder or manslaughter, as well the day and place of the stroke or other act done inducing, death, as of the death, must be exprest, the former, because the escheat or forfeiture of lands relates thereto, the latter, because it must appear, that the death was within the year and day after the stroke.

But tho the day or year be mistaken in the indictment of felony or treason, yet if the offense were committed in the same county, tho

(f) *Cro. Jac. 677.*

which makes the felony.

* Because it is the stroke or robbery,

(g) *Cro. Eliz. 739.*

at another time, the offender ought to be found guilty; but then it may be requisite, if any escheat or forfeiture of land be conceived in the case for the petit jury to find the true time of the offense committed, and therefore it is best in the indictments to set down the times as truly as can be, tho it be not of absolute necessity to the defendant's conviction. 2 Co. Instit. 318. P. 32 Eliz. Syer's case adjudged. Co. P. C. p. 230.

And therefore, if for that variance he be acquitted, he is erroneously acquitted, and yet that erroneous acquittal shall be a good plea of *autrefois acquit*, for if he be afterwards indicted for the same felony, and the day truly set forth, he may aver it to be the same felony notwithstanding the variance in the day. 2 Co. Instit. *ubi supra* in felony, and the same law is in treason. Co. P. C. p. 230.

Where the time of the day is material to ascertain the nature of the offense, it must be express in the indictment, as in an indictment for burglary it ought to say *tali die circa horam decimam in nocte ejusdem diei felonice & burglariter fregit*, yet by some opinion *burglariter* carries a sufficient expression, that it was done in the night.

So upon breaking a house in the day-time, to oust the offender of his clergy upon the statute of 39 Eliz. cap. 15. it is usual to add *tempore diurno*, for the statute expresseth it so, otherwise, tho the indictment be good, yet he shall not be ousted of his clergy.

[180] III. Touching the place where the felony is committed; regularly the vill, or hamlet and county must be express in the indictment.

And herein much of what hath been said of the time will be applicable to the place, for where the time must be repeated again upon several acts done, yet regularly the place also must be repeated, *viz. actum & ibidem*.

In some crimes no vill need be named, as upon an indictment of barretry, because he is a barretor every where, and it shall be tried *de corpore comitatûs*. T. 43 Eliz. B. R. Tunstall's case, but P. 3 Car. B. R. Mann's case the indictment was quashed for want of a vill alleged; the latter resolution is fittest to be pursued.

Suff. In the margin, the indictment supposing a fact done *apud S. in com' prædict'* is good, for it refers to the county in the margin.

But if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premises of the indictment, the fact laid *apud S. in com' prædict'*

prædicto vitiates the indictment, because two counties are named before, and it is uncertain to which it refers. *H. 42 Eliz. B. R. Croke, n, 12. Wingfield's case (h).*

Indictment against *A. B.* that he *apud N. in com' prædict'* made an assault upon *C. D.* of *F. in com' prædict'*, & ipsum adtunc & ibidem cum quodam gladio, &c. percussit, &c. this indictment is not good, because two places named before, and if it refers to both, it is impossible, and if only to one, it must refer to the last, and then it is insensible. *2 H. 7. 10. b. P. 44 Eliz. B. R. Ogle's case.*

A. is indicted, *quod ipse tali die & anno apud C. in quendam B. insultum fecit, & ipsum cum quodam cultello, &c. felonice percussit, occidit, & murderavit* without saying *ad tunc & ibidem percussit, occidit, & murderavit*, the indictment is not good, for the assault may be at one day and place, and the killing at another. *P. 5 E. 6. Dy. 68, 69. 1 R. 3. 1. a.*

If a man be indicted for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that it is in decay, it must [181] be alleged where those lands lie. *5 H. 7. 3. b.*

IV. Touching the name of the person upon whom the offense is committed.

An indictment of murder *cujusdam ignoti* is good, and so for stealing of the goods *cujusdam ignoti*, *Plo. Com. 85. b. Partridge's case, 1 Mar. Dy. 99. a.* so of an assault *in quendam ignotum*, and if he be acquitted or convicted, and be afterwards indicted for an assault or murder of such a man by name, he may plead the former conviction or acquittal, and aver it to be the same person. *11 Eliz. Dy. 285. a.*

But an indictment, *quod invenit quendam hominem mortuum, ac felonice furatus est duas tunicas*, without saying *de bonis & catallis cujusdam ignoti*, is not good. *11 R. 2. Enditement 27.*

If the goods of a chapel be stolen, the indictment shall say *bona & catalla capellæ in custodia præpositorum*, if it be done in time of vacation *bona & catalla capellæ tempore vacationis*; but if the goods of a parish church be stolen, as the bell, the books, &c. it shall run *bona parochianorum de S. in custodia guardianorum ecclesiæ*, and shall not suppose them *bona ecclesiæ*. *7. E. 4. 14, 15. M. 31 & 32 Eliz. B. R. Hadnam & Green versus Ringwood (i). 1. 36 Eliz. B. R. Metherell & Barefoot.*

(i) *See Fleta, l. 20.*

(i) *See Fleta, l. 20, 179.*

If the goods, which *A.* hath as executor of *B.* be stolen, the offender may be indicted, *quod bona B. testatoris in custodia A. executoris ejusdem B. &c.* *Lamb.* 496. or it may be general *bona ipsius A.*

If *A.* dying, be buried, and *B.* opens the grave in the night time and steals the winding-sheet, the indictment cannot suppose them the goods of the dead man, but of the executors, administrators, or ordinary, as the case falls out. *Co. P. C.* 110 (*k*).

If *A.* delivers goods to *B.* a common carrier to carry for him, and *B.* is robbed, the indictment may suppose them the goods of *A.* or the goods of *B.* at election, for *B.* hath a kind of special property, because chargeable for them to *A.*

[182] An indictment, *quod felonice, &c. cepit quandam peciam panni cujusdam J. S.* without saying *de bonis & catallis cujusdam J. S.* was therefore quashed. *M.* 38 & 39 *Eliz. B. R. Croke, n.* 6. *Long's case* (*l*).

There is no need of an addition of the person robbed or murdered, &c. unless there be a plurality of persons of the same name, neither then is it essential to the indictment, tho sometimes it may be convenient for distinction sake to add it, for it is sufficient, if the indictment be true, *viz.* that *J. S.* was killed or robbed, tho there are many of the same name.

V. Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment.

An indictment against *A.* that he is *communis latro*, 29 *Aff.* 45. *communis champartor*, *conspirator*, *confœderator*, 29 *Aff.* 45. *defamator honorum nominis & famæ*, *M.* 14 *Jac. B. R. Jones's case* (*m*), *communis malefactor*, 22 *Aff.* 73. *common robber*, 3 *E.* 2. *action sur statute* 26. *communis malegestus*, & *communis perturbator pacis domini regis*, *M.* 6 *Car.* 1. *B. R. Periam's case* (*n*), are not good, because they are too general and contain not the particular matter, wherein the offense was committed.

But *communis barretator & pacis domini regis perturbator & litium seminator* is good, because barrettry is an offense known in law, and consists of divers particulars, and the rest that is added thereunto are but the aggravations of the offense, for barrettry itself is the crime, *M.*

(*k*) *Haine's case*, 12 *Co.* 112.

(*l*) *Cro. Eliz.* 490.

(*m*) 2 *R. A.* 79. *pl.* 1.

(*n*) *Ibid.* 79. *pl.* 10.

13 *Jac. B. R. Bowser's case* (9); so an indictment, that he is *notli-vagus* is good. *H. 2 Car. 1. B. R.*

An indictment against *A. quod felonice cepit & asportavit bona & catalla B.* without shewing what in certain, as *scilicet unum equum, unum bovem, &c.* is not good. *Lamb. 496.*

The number of things stolen must be exprest, therefore it is not sufficient to say *felonice furatus est aves* or *columbas* out of a dove-cote, or young hawks out of the nest without expressing their number.

If theft be alledged of any thing, the indictment must set down the value, that it may appear, whether it be grand or petit larceny. *Lamb. 497.* [183]

Where theft is charged in an indictment for a living thing, as a horse or sheep, the regular way is to say *pretii 5s. &c.* if it be of a dead thing, that is estimated in the indictment by weight or measure, there also it ought to be *pretii*, and so it may be, if it be of any single thing, tho dead, and not estimated by weight or measure.

But if it be dead things in the plural number, there it ought to be *ad valenciam*. *Lamb. 497.* but this I take to be but clerkship and not substantial, for if *pretii* be set instead of *ad valenciam*, or *e converso*, I think it doth not vitiate the indictment, and so it is, if one *pretii* or *ad valenciam* be added to several things, where in true clerkship it should be applied severally, it is good if the party be convict of all, but possibly, if the party be convict but of part, it is not good, because it will be uncertain whether grand or petit larceny. *Noy's Rep. 115. Wood and Smith, yet vide T. 23 Car. 1. & M. 23 Car. 1. B. R. Brook's case, and William Arundell's case* in [action of] trespass, where there is but one *ad valenciam*, where divers goods were taken, tho it be aided after a verdict, yet, if the judgment be by *nihil dicit*, it was ruled error, and indictments are not aided by verdict.

An indictment, *quod felonice cepit 20 oves matrices & agnos* or *matrices & verveces*, is not good, because it doth not appear how many of one sort and how many of another, but 20 *oves* generally might have been good without distinguishing *matrices & verveces*, as in case of replevin or trespass.

But an indictment *de quatuor rifeis & cistis*, *Anglicè* chests and coffers, is good, because *synonyma*, *P. 40 Eliz. Drevot & Henshaw*; regularly the same certainty is required in an indictment for goods, as in trespass for goods, and rather more certainty, for what will be a defect

of certainty in a count will be much more defective in an indictment, herefore for this matter *vide* title *Count & Breve per totum*.

VI. The fact itself must be certainly set down in an indictment.

[184] An indictment against *A. quodd felonice abduxit unum equum* without saying *cepit & abduxit* is not good, for he might have the horse by bailment, and then it is no felony. 13 E. 4. 10. a.

An indictment of poisoning, wherein it is alledged, that *J. S. fidem adhibens* to the prisoner, *& nesciens potum prædictum cum veneno fore intoxicatum accepit & bibit*, and says not *venenum prædictum*, is not good, and shall not be supplied by the implication of other parts of the indictment. 4 Co. Rep. 44. b. *Vaux's* case.

An indictment of rape, *quodd felonice & carnaliter cognovit* without the word *rapuit* is not good, tho it concludes *contra formam statuti*. 9 E. 4. 26. a.

An indictment, that *A. exoneravit quoddam tormentum, &c. versus B. dans ei unam mortalem plagam* without saying *percussit*, is not good. 5 Co. Rep. Long's case 122. a.

So if it be *dedit mortalem plagam* without *percussit*, it is not good. P. 9 Jac. B. R. *Bulstrode's* Rep. p. 124.

For burglary, the offense must be *fregit & intravit*.

VII. The offense itself must be alledged, and the manner of it (*p*).

An indictment of felony must always allege the fact to be done *felonice*; an indictment of burglary must lay the offense to be *felonice & burglariter fregit & intravit*; an offense of high treason must be laid to be done *proditorie*; petit treason *felonice & proditorie*, for tho he be acquitted of the petit treason, he may be convict of the manslaughter or murder.

A. is indicted, that *furatus est unum equum*, it is but a trespass for want of the word *felonice*. Stamf. P. C. p. 96. a.

If *A.* be indicted, *quodd 1 Decemb. anns, &c. apud, &c. felonice & ex malitiâ suâ præcogitatâ in & super B. insultum fecit, & cum quodam gladio, &c. adtunc & ibidem percussit, & dedit eidem B. mortalem plagam, &c.* whereof he died, the first *felonice & ex malitiâ suâ præcogi-*

[185] *tatâ* applied to the assault runs also to the stroke; 1. because placed in the beginning of the sentence; 2. because done *adtunc & ibidem*.

(p) This should have been the 5th head according to our author's division at the beginning of this chapter, but our author has here transposed it, and added a new

5th head touching the thing wherein the offense is committed, which makes the number of general heads in this chapter eight instead of seven.

An indictment of murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not be only *felonice*, and ascertain the time of the act done, but must also.

1. Declare how, and with what it was done, namely *cum quodam gladio, &c.*

Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as *poisoning*, or *strangling*, it doth not maintain the indictment upon evidence. 2 *Co. Inst.* 319. *Co. P. C.* p. 48.

And if *A.* and *B.* are indicted for murder, and it is laid, that *A.* gave the stroke, and *B.* was present, aiding and abetting, yet if it falls out upon evidence, that *B.* gave the stroke, and *A.* was present, aiding and abetting, it maintains the indictment. 9 *Co. Rep.* *Sanchar's* case (9).

So if *A.* be indicted for poisoning of *B.* it must allege the kind of poison, but if he poisoned *B.* with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.

2. He must shew in what hand he held his sword.

If an indictment runs thus, that *cum quodam gladio, quem in dextrâ suâ tenuit, percussit*, without saying *in dextrâ manu*, for this cause an indictment was quashed. *P.* 44 *Eliz. B. R.* *Cuppledick's* case.

3. Regularly it ought to set down the price of the sword or other weapon, or else say *nullius valoris*, for the weapon is a deodand forfeited to the king, and the township shall be charged for the value if delivered to them.

But this seems not to be essential to the indictment.

4. It ought to shew in what part of the body he was wounded, and therefore if it be *super brachium*, or *manam*, or *latus* without saying whether right or left, it is not good. 5 *Co. Rep.* 121. *b.* *Long's* case.

So if it be *in sinistro bracio*, where it should be *brachio*, it is not good, because insensible. *T.* 31 *Eliz. B. R.* *Webster's* [186] case.

So if the wound be laid *circiter pectus*, it is not good. *T.* 29 *Eliz. Clenche's Rep.* 10. *Super partes posteriores corporis* not good. *H.* 23 *Car. 1. B. R.* *Savage's* case (1).

But *super faciem*, or *caput*, or *super dextram partem corporis*, or *in infimâ parte ventris* are certain enough. *Long's* case, 5 *Co. Rep.* 121. *b.*

(9) 9 *Co.* 119. *a.* all that this case proves is only, that if a man be indicted as accessory to two, and he be found guilty of necessary to one, the verdict is good.

(1) *Styl.* 76.

5. Regularly the length and depth of the wound is to be shewed, but this is not necessary in all cases, as namely where a limb is cut off, 4 Co. Rep. 42. a. *Haydon's case*; so it may be also a dry blow, and *plaga* is applicable to a bruise or a wound.

But tho the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it is sufficient to maintain the indictment.

6. It is usual to alledge the party stricken to have been *in pace Dei & domini regis*, but not necessary to be inserted. 4 Co. Rep. 41. b. *Haydon's case*.

7. It is necessary to alledge in fact, that the party wounded died of that wound, and also the time and place, as well of the death as of the wound given, that it may appear, that he died within the year and day of that wound, as *de quâ quidem plagâ idem J. S. adtunc & ibidem instantèr obiit*, or *de quâ quidem plagâ mortali idem J. S. languebat, & languidus vixit usque talem diem anno supradictâ, quo quidem die idem J. S. de plagâ mortali prædictâ obiit*.

Altho as well in the indictment of manslaughter as murder the stroke is to be alleged to be *mortalis plaga*, and given *felonice*, and in both cases *interfecit*, yet in case of murder there is somewhat more to be laid, or otherwise it will amount but to an indictment of manslaughter, and the offender shall have his clergy.

And the special words in an indictment of murder are, 1. [187] *Ex malitiâ præcogitatâ*. 2. *Murdravit*, this word *murdravit* is a word of art, and cannot be otherwise exprest, therefore *murderavit* instead of *murdravit* vitiates an indictment of murder. H. 45 Eliz. Croke, n. 15. Ryle's case (s).

Tho *murdravit* be in the indictment, yet if it want the words *ex malitiâ suâ præcogitatâ*, the party shall have his clergy. Dy. 224. b. 11 Co. Rep. 37. a.

An indictment of treason for counterfeiting the king's coin ought to shew particularly what kind of coin, viz. groats, or shillings. 27 H. 6. *Enticement* 10. but altho it is usual to express the numbers of each kind, yet it is not of absolute necessity in the indictment. M. 38 & 39 Eliz. B. R. *Long's case*.

An indictment of high treason for conspiring the king's death ought not only to contain the compassing or conspiring to do the act, but must also set down an overt act in pursuance of it.

As in all indictments of felony there must be *felonice*, and of treason there must be *proditorie*, so it must be laid to be done *vi & armis* at common law. *Stamf. P. C.* 94. a.

But the statute of 37 H. 8. cap. 8. hath now made that not to be necessary.

And therefore *P. 16 Jac. B. R. Croke, n. 2. Hart's case (t)*, it was adjudged and affirmed in a writ of error, that an indictment of rescue without the words *vi & armis* is good by reason of this statute, which extends to make good indictments of felony, treason, or other misdemeanors, notwithstanding the omission of *vi & armis*, as well as notwithstanding the omission of *gladiis, baculis & cultellis*, but this statute extends not to declarations in trespasses, suits between party and party, or informations for the king, but only to indictments.

VIII. Touching the conclusion of the indictment.

Upon an indictment of murder, where the stroke is supposed to be done at one day or place, and the death at another day or place, the conclusion ought not to be *& sic felonice, voluntarie, & ex malitia sua præcogitata prædictus J. S. præfatus A. B. at the day and place, where the stroke was given, interfecit & murdravit*, this is not good, because tho the stroke is the offense and cause of the death, yet it is neither murder nor manslaughter till the party die. *M. 32 & 33 Eliz. B. R. Croke, n. 13, Foster's case (u)*. [188]

But if it supposes the murder or manslaughter to be where the party died, this is good, for then and not before it is murder. *4 Co. Rep. 41. b. Haydon's case.*

But the best way is *& sic præfatus A. ipsum B. &c. modo & formâ prædictis interfecit & murdravit. 4 Co. Rep. 42. b. Haydon's case.*

But if the conclusion be *& sic præfatum B. apud C. (where the stroke only was given) modo & formâ prædictis interfecit & murdravit*, it is not good, for it is repugnant. *M. 32 & 33 Eliz. B. R. Croke, n. 13, Foster and Hume.*

And if in the same case the conclusion be only *& sic die & loco prædictis interfecit & murdravit*, it is doubtful whether it be good, because one time and place is alleged for the stroke, another for the

(t) *Cro. Jac.* 473. vide *Cro. Jac.* 345.

(u) *Cro. El.* 356. 4 *Co.* 42. b. by the

name of *Hume* and *Ogle*.

death, and (*predictis*) may refer to either, *H. 42 Eliz. B. R. Croke, n. 12. Wingfield's case (x).*

Regularly every indictment ought to conclude *contra pacem domini regis*, for that is not taken away by the statute of 37 *H. 8. cap. 8.*

And therefore an indictment without concluding *contra pacem*, &c. is insufficient, tho it be but for using a trade not being an apprentice. *H. 23 Car. 1. B. R.* for every offense against a statute is *contra pacem*, and ought so to be laid.

But an indictment need not conclude, & *contra coronam* & *dignitatem ejus*, tho it be usual in many indictments. *M. 23 Car. B. R.*

An indictment that concludes *contra pacem*, and saith not *domini regis*, is insufficient. *M. 23 Car. 1. adjudged.*

If *A.* be indicted for an offense supposed to be committed in the time of a former king, and concludes *contra pacem domini regis nunc*, it is insufficient, for it must be supposed to be done *contra* [189] *pacem* of that king, in whose time it was committed.

But if a man be indicted in the time of one king *contra pacem domini regis nunc*, he may be arraigned for that offense in the time of his successor. 1 *E. 6. B. Corone* 178. *Enditement* 44. neither is the indictment itself discontinued by the demise of the king, tho in some cases the process be. 7 *Co. Rep.* 30, 31.

If an offense be supposed to be begun in the time of one king, and continued in the time of his successor, (as a nuisance,) it must conclude *contra pacem* of both kings, or else it is insufficient. *T. 3 Jac. B. R. Yelverton's Rep.* 66. *Sir John Winter's case.*

If an offense be alledged in the time of *Q. Eliz.* and the indictment taken in the time of *K. James*, and concludes *contra pacem nuper reginæ & domini regis nunc*, it seems good, and *domini regis nunc* but surplusage, as well as in a count in trespass. *M. 13 Jac. Croke, n. 3. Cottington and Wilkins, (z) quære.*

Touching the conclusion *contra formam statuti*, somewhat hath been said in the last chapter; I shall add some things more.

If an offense be newly enacted, or made an offense of an higher nature by act of parliament, the indictment must conclude *contra formam statuti*, as an indictment for buggery, transporting of wool, &c.

Rape, tho before the statute of *Westminster 2.* it was a trespass, yet being made felony by that statute, the indictment ought to conclude *contra formam statuti*, 6 *H. 7. 5. a.*

(x) *Cro. Eliz.* 739.

(z) *Cro. Jac.* 377.

If an offense were high treason, &c. at the common law, and a declarative act of parliament declares it so, as the statute of 25 E. 3. *de Proditinibus*, the statute of 3 H. 5. of clipping the coin, &c. till repealed by 1 Mar. the indictment is good with a conclusion *contra formam statuti*, or without such a conclusion.

But at this day the indictment for clipping, washing, &c. of coin enacted to be treason by the statutes of 5 & 18 Eliz. must not only express, as the statute requires, that it was (*causa lucri*,) [190] but must conclude *contra formam statuti*.

If an offense were felony at common law, but a special act of parliament oust the offender of some benefit, (that the common law allowed him,) when certain circumstances are in the fact, tho the body of such indictment must express those circumstances according as they are prescribed in the statute, yet the indictment must not conclude, *contra formam statuti*.

Thus the statute of 21 Jac. cap. 27 concerning murdering of bastard children requires proof by one witness, that the child was dead born, the indictment must shew, that it was a bastard child, to bring the offender within that statute, but concludes not *contra formam statuti*.

So by the statute of 8 Eliz. cap. 4. in cases of pick-pockets, 39 Eliz. cap. 15. breaking houses in the day-time, and stealing to the value of 5s. the statute of 23 H. 8. cap. 1. in cases of petit treason, wilful murder of malice prepense, robbing in or near the highway, 18 Eliz. cap. 7. in case of burglary, the statute of 4 & 5 P. & M. cap. 4. in case of malicious commanding, &c. any person to commit murder, robbery, wilful burning, the offenders are ousted of their clergy; the body of the indictment must bring them within the express purview of the statutes or otherwise they shall have the benefit of clergy, but it need not conclude *contra formam statuti*, neither is it usual in such cases, for they were felonies before, and the statutes do not give them a new punishment, nor make them to be crimes of another nature, but only in certain cases take away clergy.

But yet, if they should conclude in these cases *contra formam statuti*, it would not vitiate the indictment, but would be only superfluous; for tho the statutes do not give a new penalty, yet they take away an old privilege, when the case falls within the circumstances mentioned by the act.

Upon the statute of 1 Jac. cap. 8. ousting persons of clergy in case of stabbing, the other party not having a weapon drawn, nor stricken
first

first, I have known it held it is sufficient, that the indictment bring the fact within the purview of the statute, tho it concludes not *contra formam statuti*, because it was felony before, and the statute only takes away clergy. *H. 23 Car. 1. Page and Harwood (a).*

Yet the usual course at this day is to conclude such an indictment *contra formam statuti*, and accordingly it hath been ruled good. *T. 9 Jac. B. R. Croke, n. 4. Bradley and Banks*, but it is not there questioned but that it may be good without it; so that in these cases, where clergy is specially ousted by an act of parliament, the indictment is good with this conclusion or without it, but the best way in these cases is to follow what is most usual.

If an offense be at common law, and also prohibited by statutes, the indictment may conclude *contra formam statuti* or *statutorum*; thus in barretry, tho there be no direct statute against it by that name, yet the general tenor of the several acts running against it by circumlocutions, the indictment concluding *contra formam statuti*, or *diversorum statutorum* is good, and it is the usual form. *M. 31 & 32 Eliz. B. R. Croke, n. 14. Burton's case (b), H. 9 Car. 1. B. R. Chapman's case (c),* but it must conclude also *contra pacem*, *M. 6 Car. B. R. Periam's case (d).*

If an offense be at common law, and also prohibited by statute, with a corporal or other penalty, yet it seems the party may be indicted at common law, and then, tho it conclude not *contra statuti*, it stands as an indictment at common law, and can receive only the penalty, that the common law inflicts in that case.

Thus an indictment for a riot is good, tho it concludes not *contra formam statuti*, because an offense at common law, tho prohibited also by acts of parliament under severer penalties. *P. 5 Jac. B. R. Wormall's case (e).*

So it seems, if perjury be committed, that is within the statute of 5 *Eliz. cap. 9.* but concludes not *contra formam statuti*, yet it
[192] is a good indictment at common law, but not to bring him within the corporal punishment of the statute.

And yet *Mich. 10 Jac. B. R.* an indictment of forceable entry upon the statute of 8 *H. 6. cap. 9.* and *Mich. 9 Car. 1. B. R.* an indictment for forgery quashed for not concluding *contra formam sta-*

(a) *Allyn 43. Styl 85.*

(b) *Cro. Eliz. 148.*

(c) *Cro. Car. 340.*

(d) 2 *R. A. 82. pl. 5.*

(e) 2 *R. A. p. 82. pl. 4.*

tuti, *Smith's case* (f); yet both these were offenses at common law the restitution were not at common law in the first case nor pillory and loss of ears in the second, but only fine and imprisonment, or at most standing in the pillory, but without mutilation.

Regularly, if a statute only make an offense, or alter an offense from one crime to another, as making a bare misdemeanor to become a felony, the indictment for such new made offense, or new made felony must conclude *contra formam statuti*, or otherwise it is insufficient.

And on the other side, if an offense be purely at common law, if it conclude *contra formam statuti*, it is insufficient, and shall be quashed, except in the instance above given touching clergy, *de quo supra*.

And therefore an indictment of battery concluding *contra formam statuti* is insufficient, and shall be quashed. *T. 12 Car. B. R. Creke, n. 2. Chohnley's case* (g).

These general observations I shall add touching indictments upon statutes, and concluding *contra formam statuti*.

Altho an indictment grounded upon a statute must conclude *contra formam statuti*, yet it is not necessary to recite the statute in the indictment, unless it be a private statute, whereof the court cannot take notice. *Plc. Com. 79. b. Patridge's case. Dy. 347. a. 363. a.*

Altho it need not recite a general penal statute, yet it must bring the fact within the exprefs prohibition of the statute, otherwise the conclusion *contra formam statuti*, and the implication thereof will not aid the indictment, but it will be insufficient, *9 E. 4. 26. b.* As in an indictment in a *premunire* for aiding one being a principal maintainer of the jurisdiction of the see of Rome *contra formam statuti*, yet these words being omitted *to the intent to set forth the authority, &c.* which are part of the qualification of the offense containd in the statute, the indictment is insufficient, and not aided [193] by the conclusion *contra formam statuti*. *T. 20 Eliz. Dy. 303. a. ibid. 347. a.* so an indictment upon the statute of 1 Jac. cap. 12. of witchcraft, if *A.* be indicted, that *exercuit incantationem, Anglicè* witchcraft, *contra formam statuti*, without saying, that thereby any person was pined, lamed, &c. in his body, it is insufficient, because that is a circumstance required to make it felony; but if the indictment be, that *exercuit, anglicè* did employ *males & nefarios spiritus ad*

(f) 2 R. A. 82. pl. 3.

(g) Cro. Car. 465.

intentione to destroy *J. S.* this is good, tho no other event ensues, for the bare employment of evil spirits to or for any intent in felony. *T. 24 Car. 1. B. R.* upon an indictment removed from *St. Edmunds-Bury*.

And thus far touching the forms of indictments, wherein generally we are to take notice, 1. That none of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.

2. That in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God. And it were very fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy (*h*).

(*h*) This advice of our author would, if complied with, be of excellent use, for it would not only prevent the guilty from escaping, but would likewise be a guard to innocence, for thereby would be removed the only pretence, upon which counsel is denied the prisoner in cases of

felony; for if no exceptions were to be allowed, but what went to the merits, there would then be no reason to deny that assistance in cases, where life is concerned, which yet is allowed in every petty trespass.

[194]

C H A P. XXVI.

Concerning process upon indictments.

IN many cases upon an indictment process of outlawry lies not at common law, nor at this day, as in an indictment of forestalling, *22 E. 4. 11. b.* but in an indictment of trespass the process is *venire facias*, and when *non inventus*, is returned *capias* and *exigent*.

But in all indictments of felony or treason process by *capias* and *exigent* lies, and at the common law in case of felony or treason there

was

was but one *capias*, and upon *non inventus* returned an *exigent* awarded, and so to the outlawry. 22 *Aff.* §1. 1 *H.* 5. 6. *a.*

But by the statute of 25 *E.* 3. *cap.* 14. If a man be indicted before justices in their sessions to hear and determine, and be returned *non est inventus* upon the *capias* issued, another writ of *capias* shall issue returnable three weeks after with a precept to seise his goods, and detain them till the precept returned, and if again *non inventus* be returned, then an *exigent* shall issue, and the goods forfeit, and if he yield himself upon the *capias*, then the goods saved.

This statute extends not to treason, and therefore certainly in treason the *exigent* must issue upon *non inventus* returned upon the first *capias*.

And altho the statute speaks generally of felony, it seems that upon an indictment of murder the *exigent* shall issue after the first *capias*, as at common law, and accordingly in an appeal of robbery. 8 *H.* 5. 6. *b.* *Process* 226. *Coron.* 184.

But it is said, that in an indictment (or appeal) of robbery there shall be two *capias* in the king's bench before the *exigent* shall issue. 8 *H.* 5. *ubi supra.* *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 67. *a.*

But at this day the process in case of an indictment of any felony is only one *capias*, and then an *exigent*. [195]

For this statute of 25 *E.* 3. *cap.* 14. as to the second case is hardly applicable to the king's bench, nor indeed well to other justices, that sit by commission, for the second *capias* is to be returned at three weeks after, which may be out of term, or after the session of the justices ended; therefore *quære* the usage.

By the statute of 3 *H.* 6. *cap.* 10. upon appeals or indictments of treason, felony, or trespass before justices of peace or any other having power to take such indictments or appeals, or other justices or commissioners in any county or franchise against any person dwelling in any other county than where the indictment or appeal is taken, after the first *capias*, another *capias* shall issue to the sheriff of that county, wherein the party indicted is supposed to be conversant, returnable before the said justices or commissioners three months after, &c. with a precept to the sheriff to make proclamation at two county courts for his appearance at the day of the return, and then the *exigent* to issue upon his default, and in case any *exigent* be awarded, or outlawry pronounced, otherwise to be holden for none.

But if the party were conversant in the county where he is indicted at the time of the felony or treason committed, the process to be, as was at common law.

A proviso not to extend to the king's bench nor *Chester*.

By the statute of 10 *H. 6. cap. 6.* the same process is directed upon indictments of felony or treason removed into the king's bench by *certiorari*, or into any other courts.

But as to indictments of felony or treason originally taken in the king's bench, they are not within these statutes, but by the statute of 6 *H. 6. cap. 1.* there is special provision made, that before any *exigent* awarded the court shall issue a *capias* to the sheriff of the county, where the indictment is taken, and another to the sheriff of that county whereof he is named in the indictment, having six weeks time or more before the return, and after these writs returned the *exigent* to issue as before.

[196] Upon these statutes, little effect hath been obtained, for if the party were conversant in the county where the felony or treason was committed, (as indeed he cannot be otherwise,) then he may be named of that place where the fact was committed in the indictment, and then the process is to go, as at common law before the statutes, and this is the usual course at this day, that if the felony be committed in *A.* in the county of *B.* the indictment runs only, *quod J. S. nuper de A. in com' B. prædict'* (where the indictment is taken).

And upon the same reason it is, if *J. S.* be indicted in the county of *B.* for a felony there committed, and the indictment runs thus: *J. S. nuper de A. in com' B. aliàs J. S. nuper de D. in com' S.* there shall no process go to the sheriff of *S.* because that addition is only in the *aliàs dictus*, which is neither material nor traversable, and therefore process shall issue only in the county of *B.* where he is indicted, and no *capias* with proclamation in the county of *S.* and the same law in an appeal. 1 *E. 4. 1. a.*

If *J. S.* be indicted in the county of *B.* in this manner; *J. S. de A. in com' B. nuper de C. in com' D.* the *capias* shall issue only in the county of *B.* for there the indictment supposeth him actually conversant at the taking of the indictment; but if the indictment runs thus: *J. S. nuper de A. in com' B. nuper de C. in com' D.* in this case there shall go a *capias* not only into the county of *B.* where he is indicted, but upon the return thereof, (if it be before commissioners,)

a *capias* with proclamations to the sheriff of *D.* and (if in the king's bench upon an indictment originally found there,) one *capias* to one sheriff, and another to the other sheriff according to the statutes of 8, 10 and 6 *Hen.* 6. above-named, because he is not named *de A.* in *com'* B. but *nuper de A. in com' B.* and *nuper de C. in com' D.* and not with an *aliàs dictus*, as in the former case. 30 *H.* 6. *Process* 192 (*h*).

If a man be indicted by the name of *J. S. nuper de A. in com' Cestrie*, the second *capias* with proclamation shall be awarded to the prince or his lieutenant, 31 *H.* 6. 11. and the like to the bishop of *Durham*, or chancellor of *Lancaster*. [197]

There was a very sharp, yet useful statute, 2 *H.* 5. *cap.* 9. " If
 " any person make complaint in the chancery of any felony or riot
 " committed, and that the offender fly or withdraw himself to the
 " intent to avoid execution of the common law, a bill thereof shall
 " be made for the king and deliverd to the chancellor, who, (if he
 " be duly informed, that such bill containeth truth,) shall, at his dis-
 " cretion, grant a *capias* to the sheriff of the county where the of-
 " fense is committed, returnable in chancery at a certain day; and
 " if the persons yield themselves to the sheriff, they shall be com-
 " mitted or bailed, as the case shall require, and it shall be commanded
 " to inquire of the fact, and thereupon to be done as the law re-
 " quireth; but if they appear not, then a writ of proclamation to
 " issue to the sheriff returnable in the king's bench, by which it shall
 " be commanded, that he make proclamation in two counties, that
 " the parties appear in the king's bench to answer the matters in the
 " bill, (the substance whereof is to be recited in the writ,) upon
 " pain to be convict of the offense, and if they come not at the day,
 " to stand attaint, and if they come *then*, the fact to be inquired of
 " as above.

" Provided that the suggestion of such riots be testified to the chan-
 " cellor under the seals of two justices of the peace and the sheriff
 " of the county before the *capias* granted, the substance of the com-
 " plaint to be express in the writ of *capias*, and also in the writ of
 " proclamation." Like provision for the counties palatine.

This is marked as an obsolete statute, but I know no act of par-
 liament that repeals it, unless it be the implication of the statute of

16 *Car. 1. cap. 10.* which yet seems not to extend to the repeal of these statutes, for the chancellor hath no power to hear and determine the offenses, but only to grant preparatory process to bring them *in* to answer according to law, for they are to be proceeded against by indictment, if they appear.

[198] Yet this statute hath not been, that I know of, put in ure.
 1. Because it seems doubtful, whether it extends to murders or robberies, unless accompanied with a riot. 2. Because it is left to the discretion of the chancellor to issue the process. 3. Because so many things previous to the process are required, as bill, certificates, probable evidence. 4. Because it takes up so much delay, that they may as soon be taken up by the ordinary way of indictment and process of outlawry. 5. And especially, because in such case the warrant of the chief justice or any other judge of the king's bench, upon oath made touching the offense and the offenders, reacheth all parts of *England*. 6. Because it is so severe, for an innocent person may be convicted upon default of appearance, and yet have had no notice; but in case of an outlawry, tho it be an attainder in itself, yet small exceptions are commonly allowed to the process or return, and so by writ of error usually and easily reversible, and the party put to plead to the indictment.

But certainly it might be of great use to bring *in* and punish notorious offenders, if issued discreetly and upon great occasions, provided the parties were first indicted by the grand inquest.

Now, for the farther declaring the business of process upon indictments of felony these points are considerable. 1. Who may issue process of outlawry. 2. Against whom it is to be issued in relation to principals and accessaries. 3. What the tenor of the *exigent* and outlawry. 4. What the effect or consequence of either. 5. How avoided either by discontinuance, *superseas*, or error.

I. As to the first of these, namely, who may issue process by *capias* and *exigent*.

The court of king's bench either upon an indictment originally taken before them, or removed thither by *certiorari* may issue process of *capias* and *exigent* into any county of *England* upon a *non est inventus* returned by the sheriff of the county, where he is indicted, and a *testatum*, that he is in some other county.

[199] Justices of gaol-delivery regularly cannot issue a *capias* or *exigent*, because their commission is to deliver the gaol *de prisonibus*

prisonibus in ea existentibus, so that those, whom they have to do with, are always intended in custody already; *vide supra cap. 5.*

Justices of *oyer and terminer* may issue a *capias* or *exigent*, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county, where they hold their sessions at common law.

But by the statute of 5 *E. 3. cap. 11.* they may issue process of *capias* and *exigent* to all the counties of *England* against persons indicted or outlawed of felony before them.

Justices of peace may make out process of outlawry upon indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of peace by the statute of 1 *E. 4. cap. 1.* but the power of the sheriff to make any process upon indictments taken before him is taken away by that statute.

The process to the outlawry, *viz.* the *capias* and *exigent* must be in the king's name, and under the judicial seal of the king appointed to that court that issues the process, and with the *teste* of the chief justice, or chief judge of that court or sessions.

A man is indicted by inquisition before the coroner, *quare* if he can by law make out process of outlawry; *videtur quod sic.* 27 *Affiz.* 47. *B. outlawry* 38.

II. Against whom process of outlawry shall issue upon an indictment.

Altho in civil actions between party and party regularly a *capias* or *exigent* lies not against a lord of parliament of *England*, whether secular or ecclesiastical, yet in case of an indictment for treason or felony, yea, or but for a trespass *vi & armis*, as an assault or riot, process of outlawry shall issue against a peer of the realm, for the suit is for the king, and the offence is a contempt against him: And therefore, if a rescue be returned against a peer, 1 *H. 5.* or if a peer of parliament be convicted of a disseisin with force, *H. 32 Eliz. B. R. Croke, n. 9.* Lord *Stafford's* case (*i*), or denies his deed, [200] and it be found against him, *M. 38 & 39 Eliz. B. R.* and it be found against him, *M. 38 & 39 Eliz. B. R.* [200] *Croke, n. 26.* the earl of *Lincoln's* case (*k*), a *capias pro fine* an *exigent* shall issue, for the king is to have a fine, and the same reason is upon an indictment of trespass or riot, and much more in the case of felony.

(i) *Cro. Eliz.* 170.

(k) *Cro. Eliz.* 171.

In an appeal by writ against principal and accessary, because the writ is general and distinguisheth not which is principal and which accessary, the process by *capias* shall go against them all; but if the defendants make default, the plaintiff in the appeal ought to declare which is principal and which accessary before the *exigent* issues, and then the *exigent* shall go only against the principal, and if he distinguisheth it not, but prays an *exigent* against all, he is concluded to charge any as accessary.

But in an appeal by bill or an indictment, the bill or indictment declares which is principal and which accessary, and there indeed the process by *capias* is against them all, but when it comes to the *exigent*, the *exigent* shall issue only against the principal, and process continue by *capias infinite* against the accessary, till the principal be outlawed, and then an *exigent* to issue against the accessary, because then the principal is attaind by outlawry; and if the accessary appear upon the *capias*, he shall be let to bail, and have *idem dies* by bail till the process be determind against the principal, and this was the common law, but farther settled by the statute of *Westm. 1. cap. 14. 2 Co. Instit. p. 183. and Stamf. P. C. Lib. II. cap. 17. fol. 69 & 70.*

If *A.* and *B.* be indicted as principals in felony, and *C.* as accessary to them both, the *exigent* against the accessary shall stay as before, till both be attaind by outlawry or plea. 40 *Affiz.* 25. & 7 *H.* 4. 36. *b.* for it is said, if one be acquitted, the accessary is discharged, because indicted as accessary to both, and therefore shall not be put to answer till both be attaind. 2 *Ca. Instit.* 183. *Plowd. Com.* 99. *b. dubitatur*; for tho *C.* be accessary to both, he might have been in-

[201] dicted as accessary to one, because the felonies are in law several, but if he be indicted as accessary to both, he must be prov'd so. 4 *Co. Rep.* 44. *b. Vauxe's case.* 47. *b. Waite's case,* 2 *Co. Instit. ubi supra*; but *vide* 9 *Co. Rep.* 119. *a.* lord *Sanchar's case contra per totam Curiam.*

Nota the diversity seems to be between an accessary to two principals in an appeal, there he shall not be convicted, if he be only accessary to one; but if *A.* and *B.* be indicted as principals, and *C.* be indicted as an accessary to both, if he be found accessary to one, he shall be convicted, because the king's suit; *quare* 8 *H.* 5. 6. *b.* 9 *Co. Rep.* 119. *a.* lord *Sanchar's case* (*).

(*) *Vide supra, Part I. p. 624.*

III. As to writ of *exigi facias*, and the return thereof.

If the defendant render himself to the sheriff before the *quinto exactus*, and appear in court at the return of the *exigent* and plead, and is bailed to attend the trial, and then make default, the inquest shall not be taken by default in any case of felony, either upon an indictment or an appeal, tho it may in other cases, but a new *capias*, and after that an *exigent* shall issue, and a *capias* against the bail. 19 E. 3. *Exigent* 10.

If an *exigi facias* be delivered to the sheriff, and there are but two county-courts before the return, and the sheriff return the first and second *exactus* & non comparuit, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may issue a special *exigi facias* with an *allocato comitatu*, if it be prayed, after the return, and before any new county-day be past, but if any county-day be past between the last of the former county-days and the return, no *exigi facias* shall issue with an *allocato comitatu*, but an *exigi facias de novo*, for the demand of the party must be at five county-courts successively held one after another without any county-court intervening, 22 E. 3. 11. a. so if after the second *exactus* the offender render himself and finds mainprise, and at the day of the return makes default, *exigi facias* with an *allocato comitatu* shall issue, because three county-days intervened, but a new *exigent* and a *capias* against the bail, 22 E. 3. ubi supra, and 22 E. 3. [202] *Exigent* 14.

And therefore in *London*, where the holding of the hustings is uncertain, no *exigi facias* shall issue with an *allocato husting'*, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county-court. 21 E. 3. 35. b. 17 E. 3. 49. b. *Exigent* 11. but *vide contrarium* at this day an *allocato husting'*, H 19 Jac. B. R. *Archer* and *Dalby* (D), where it was agreed, that if an *exigent* issues in *London*, and they begin in hustling *de placito tenæ*, (as they may) they shall proceed along at that hustings to the outlawry, without mingling their hustings *de conventionibus placitis*; but if an *allocato husting'* comes, they shall proceed without omitting any hustling.

If the offender appear at the *capias* and pleads to issue, and is then let to bail to attend his trial, and then make default, the inquest in case of felony shall never be taken by default, but a *capias ad audientiam*

dam juratam shall issue, and if he be not taken, an *exigent*, *vide* 26 *Aff.* 51. *Coron.* 196. and if he appeared upon the *exigent* and then made default, an *exigi facias de novo* shall issue. 16 *Aff.* 13.

But, if upon the *capias* or *exigent* the sheriff returns *cepi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. 30 *Affiz.* 23. but if the party be returned outlawd, the process thereupon is a *capias utlegatum*.

And that I may say is once for all, as well this process of *capias utlegatum* as all other process upon an indictment, and generally all process for the king are with a *non omittas propter aliquam libertatem*.

And therefore, by virtue of these processes, the sheriff may enter into any liberty to execute the same.

And if the party be in his own house, or in the house of any other, if the doors be shut, and the sheriff having given notice of his process demand admittance and the doors be not opened, he may break open the doors and enter to take the offender. 5 *Co. Rep.* 91. *b. Semayne's* case, & *libros ibidem*.

[203] Nay farther, if a party outlawd be in a house, and the door be refused to be opened, the constable, or any other person in pursuit of the felon, may break open the doors and apprehend a person outlawed or indicted of felony.

The return of the outlawry must be certain.

It must shew where the county-court was held, and in what county, therefore *ad comitatum meum S. tent. apud C.* and says not *in comitatu prædicto* or *in com' S.* is erroneous. 11 *H.* 7. 10. *a. dubitatur*.

The like if it be *ad comitatum meum tentum apud S. in com' Somers'*, and says not *ad comitatum meum Somers'*, or *ad comitatum Somers'*, without saying *ad comitatum meum Somersfet.* *P.* 7. *Jac. B. R.* adjudged, *Whiting's* case (*m*). 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

And yet in that case at the desire of the king's attorney, in case of an outlawry of felony a *certiorari* issued to the coroners to certify the truth, and thereupon the return was amended according to a like precedent in the time of *E. 4. T. 3 Car. B. R. Plum's* case (*n*),

The sheriff must return the day and year of the king to every *exactus*.

If the day and year of the king be inserted in the 1, 2, 3 and 5 *exactus*, but omitted in the 4th *exactus*, it is erroneous, and shall not be

(m) 2 *R. A. p.* 803. *pl.* 2.

(n) *Palm.* 430. *Latch* 210.

supplied by intendment. *M. 14 Jac. B. R. Chapman's case* adjudged (o).

So if it be *anno regni dominæ reginæ* without saying *Elizabethæ*, or *dominæ Elizabethæ* without saying *reginæ*. *P. 7 Jac. C. B. Burford's case* (p) and *Brandling's case* (q), or *anno regni domini regis Jacobi* without saying *regni sui Angliæ*, for the year of *England and Scotland* differ. *H. 7. Jac. Pen's case* (r), so if there be less than a month between the first and second *exactus*. *H. 13 Jac. B. R. Taverner's case* (s).

Ad hustling tent' apud Guildhall civitatis London without saying *de communibus placitis* is erroneous, because they have two hustings, one *de communibus placitis*, another *de placitis terræ*. [204]
6 *H. 7. 15. b. 11 H. 7. 10. a.*

So if an *exigent* be against *A. and B.* and the return is *primo exacti fuerunt & non comparuerunt* without saying *nec eorum aliquis comparuit*, it is erroneous. *H. 13 Jac. B. R. Taverner's case* adjudged (t), & *sæpius alibi*.

If there be two coroners in a county, the calling upon the *exigent* may be by one of them, and likewise one alone may give the judgment of outlawry. 14 *H. 4. 34. b. per Hankf. 39 H. 6. 40. b.*

But it seems the return must be by two in ministerial acts. 14 *H. 4. 34. b. 39 H. 6. 40. b.*

The name of the coroner must be subscribed to the judgment of outlawry at the *quinto exactus*. *M. 9 Car. B. R. Ethrington's case* upon an outlawry of felony, and it must be subscribed also by the name of their office *A. B. and C. D. coronatores*, unless in *London*, where the mayor is coroner. *M. 13 Jac. B. R. Earle's case* (u). *P. 17 Jac. Croke, n. 11. Garrard's case* (x).

The sheriff's name and office must also be subscribed to the return of the *exigent*, e. g. *A. B. armiger, vicecomes*.

IV. As to the effect of the *exigent* or outlawry in treason or felony.

1. As to the *exigent* the very issuing of the writ of *exigent* in case of treason or felony gives to the king or the lord of a franchise, to whom that liberty is granted, the forfeiture of all the goods of the party so put in *exigent* from the time of the *teste* of the writ of *exigent*. 41 *Affiz. 13.*

(o) 2 *R. A. p. 803. pl. 7.*

(p) *Ibid. p. 802. pl. 6.*

(q) 2 *R. A. p. 802. pl. 7.*

(r) *Ibid. p. 802. pl. 8.*

(s) *Ibid. p. 802. pl. 5.*

(t) 2 *R. A. p. 802. pl. 1.*

(u) *Ibid. p. 802. pl. 3 & 4.*

(x) *Croke Jac. 531.*

And therefore, if in an appeal the *exigent* be well awarded, tho the writ of appeal be abated, the forfeiture of the goods by the *exigent* stands in force. 43 E. 3. 17. b. *Stamf. P. C. Lib. III. cap. 22. fol. 184. b.*

And tho the outlawry be reversed for error in law or in fact, as if the party were imprisond at the time of the outlawry and after the [205] *exigent*, whereby the outlawry is reversed, yet the *exigent* being well awarded the forfeiture of the goods stands. 19 E. 3. Forfeiture 19. 30 H. 6. *ibid.* 31.

And therefore a special writ of error lies even upon the award of the *exigent* for the party so put in *exigent* or his executors to reverse the award of the *exigent*, if it were erroneously awarded for error in law or error in fact. M. 33 & 34 Eliz. B. R. *Marshe's case adjudged*, cited in *Foxley's case*, 5 Co. Rep. 111. a. but not without reversal by writ of error. *Ibid.* As if he were in prison, or beyond the sea, or had a charter of pardon before the *exigent* awarded, and thereupon the very award of the *exigent* shall be reversed, and the party restored to his goods, and so it is for matter of law, as if the *exigent* issued against the accessary before the principal attainted. *Stamf. ubi supra.*

But the avoiding only of the outlawry avoids not the *exigent* if well awarded, nay altho the party render himself after the *exigent* awarded, and plead to the indictment, and is found not guilty, yet the forfeiture by the *exigent* stands in force. 22 Affiz. 81.

Therefore it is necessary for a party outlawd in felony to bring his writ of error specially *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ*, for tho the outlawry be reversed, it doth not reverse the award of the *exigent*.

But error in the *exigent* is cause to reverse the outlawry, and error in the appeal or indictment, upon which the *exigent* is awarded, is cause to reverse both outlawry and *exigent*.

But without a judgment of reversal in a writ of error the forfeiture by the *exigent* awarded stands, tho the indictment be quashed or the appeal abated, because the king's title being of record must be avoided by a record, and so are the books of 41 Affiz. 13. 43 E. 3. 17. b. to be reconciled, *vide Foxley's case, ubi supra.*

2. As touching the forfeiture by outlawry. Outlawry of treason or felony is a conviction and attainder of the offense charged in the indictment.

And

And as the award of the *exigent* gives the forfeiture of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawed, viz. in case of outlawry of treason his lands are forfeited to the king, of whomsoever they are held, and in case of outlawry of felony to the lord by escheat, of whom they are immediately holden.

But it must be remembred, that the bare judgment of outlawry by the coroners without the return thereof of record is no attainder, nor gives any escheat. *Co. Lit.* §. 197. *fo.* 128. *b.* 28 *Affiz.* 49.

But it must be returned by the sheriff with the writ of *exigi facias*, and the return indorsed.

And therefore, if there be a *quinto exactus*, and thereupon *utlegatus est per judicium coronatorum*, but no return thereof is made, there lies a writ of *certiorari* to the coroners, 9 *H.* 4. 7. *b.* 36 *H.* 6. 24. *b.* *Dy.* 223. *a.* or to the sheriff and coroners, *Register* 284. *a.* 38 *E.* 3. 14. *b.* vide *Dy.* 317. *a.* to certify the outlawry into the king's bench, but this is only either to ground a charter of pardon upon it, 9 *H.* 4. 7. *b.* or to amerce the sheriff, where he returned only a *quarto exactus* when it was *quinto exactus*, 36 *H.* 6. 24. *b.* but of what effect it is otherwise, there seems diversity of opinions: I think as followeth.

1. That it doth not disable the party to bring an action, because in relation to party and party it stands as nothing, till returned by the sheriff. *Mich.* 14 & 15 *Eliz.* *Dy.* 317. *a.* *Puttenham's* case.

2. That consequently, barely upon such a return of an outlawry upon a *certiorari*, without the writ of *exigent* indorsed and returned together with the *certiorari*, it seems no writ of escheat lies for the lord; *quære.*

3. But if the writ of *certiorari* be directed to the sheriff and coroners, and the writ of *exigent* be extant in court, and they return this outlawry, possibly this may be a sufficient warrant to enter it of a record, as a return upon the *exigent*, for the king's advantage, and to issue upon it a *capias utlegat'*. 38 *E.* 3. 14. *b.* to have the forfeiture of his goods. 14 & 15 *Eliz.* *Dy.* 317. *a.* *Co. Lit.* *fol.* 288. *b.* 37 *H.* 6. 17. *a.* vide *Proctor's* case. *P.* 5 *Eliz.* *Dy.* 223. *a.* [207]
And *Stanley's* case there cited out of 18 *E.* 4. to this purpose.

4. But unless the writ is some way returned or extant, I think it gives the king no title to land or goods, for the writ of *exigi facias*

is the warrant of the outlawry, and *that* which gives the coroners their authority in such a case to give judgment of outlawry.

And it is not like the case, where there was once a writ and return of outlawry, and the record since lost, for that upon circumstances a jury upon the general issue may find a record, tho not shewn in evidence; but here the writ was never in truth indorsed nor returned.

5. But if the writ of *certiorari* were directed to the coroners alone, tho it may be a ground to cause the sheriff to mend his return and make it according to the truth, yet the certificate of the coroners will not make a record to intitle the king or lord to any thing without the writ of *exigent* extant, and the return upon it amended by the sheriff, for without the *exigi facias* and the return of the outlawry upon it, I think there is neither disability, forfeiture, nor escheat, and therefore *P. 8 Jac. C. B.* a *certiorari* shall not be so much as granted to the coroners to remove an outlawry after the parties death. Sir *John Fit's* case.

V. Touching the avoiding of the outlawry, it is to be done either by plea or by writ of *identitate nominis*, or by writ of error.

1. By plea, where the record of the outlawry is not avoided but made good against another person, as where the outlawry is against *J. S. de B.* and the party taken upon it is another person of another addition, as *J. S. de C.* or *J. S. junior*, &c. *vide 19 H. 6. 53. a. 10 E. 4. 16. a. 20 H. 6. 19. a.*

2. By writ of *identitate nominis*, *vide F.N.B. 267. 20 E. 3. Brief 683. 14 H. 4. 27. a.*

3. By writ of error, for it is a judgment of record and must be avoided by record.

The errors assignable are either errors in law, whereof before, or errors in fact, which are many, as if the party outlawd were an [208] infant under fourteen years old in case of felony. *Dy. 104. b. 3 H. 5. Utlagarie 11.*

So if he were imprisoned at the time of the outlawry, unless being brought to the bar and demanded, if he will appear, and he refuse it. *M. 8 Jac. C. B. 1 H. 7. 13. 21 E. 4. 73. b.*

As touching avoiding of an outlawry of felony, because beyond the sea. *H. 15 Jac. B. R. Carter's case (y)*, these differences were

agreed by the court, whereby the differing books are reconciled upon view of divers precedents.

1. If a man having committed a felony goes beyond the sea voluntarily, or upon his own occasions, and not in the king's service before any *exigent* awarded, tho after the indictment, and then an *exigent* is awarded, and the offender being beyond the sea is outlawd for the felony, he may assign it for error.

2. But if after the *exigent* awarded upon the indictment of felony, then he goes beyond the sea voluntarily or upon his own occasions, and being so beyond sea is outlawd, he shall not avoid it by such being beyond sea, because the *exigent* awarded gives him notice of the prosecution, and by such a means he may avoid his conviction by staying till all the witnesses are dead.

3. But if *prima facie* the error in that case is well assigned, by alleging he was *ultra mare tempore promulgationis utlegariæ*, and if he were in the realm after the *exigent* issued, it shall come in by the plea of the king's attorney to shew it.

4. But if he were within the realm at the time of the *exigent* issued, and went beyond sea upon the service of the king or kingdom, and then is outlawd being beyond sea, this outlawry shall be reversed, and if the party allege generally, that he was *ultra mare tempore promulgationis utlegariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the *exigent* and before the outlawry pronounced upon the king's command or service, and shew it specially, and so confess and avoid the plea.

And it is to be observed, that altho the death of the king doth not discontinue the indictment, yet the king's death [209] pending the process and before the outlawry discontinues the process, and this is not aided by the statute of 1 E. 6. cap. 7.

Upon a writ of error upon an outlawry in felony, the record of the outlawry *cum omnibus ea tangentibus* is removed into the king's bench, wherein these things are observable.

1. That the party outlawd must render himself in custody, and in custody must come in person to the bar, and when he is demanded what he can say, he is in person to pray allowance of the writ of error.

2. The

2 The writ being allowd the record is to be removed, namely the indictment, process, and return, and outlawry, he is then to assign his errors in person, and a day is given to the king's attorney to reply to him, and in the mean time a *scire facias* to the lords mediate and immediate is to issue returnable at fifteen days *ad audiendum errores*.

3. If any lords do appear, they may plead to the errors; if the sheriff return there are no lands, &c. then the court proceed to examine the errors.

4. The outlawry being reversed he is put to answer the indictment, and may plead to it, and be tried at the king's bench bar, or the record may be remitted into the country, if it were removed into the king's bench by *certiorari*, with a command to the justices below to proceed by the statute of 6 H. 8. cap. 6. *de quo supra*, p. 3.

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C H A P. XXVII.

Touching certiorari out of the king's dominions.

THO a writ of *certiorari* be not properly or directly a process upon an indictment, yet it has relation to it, and in order to the full understanding of the pleas of the crown is necessary to be considered.

The king's bench is the sovereign ordinary court of justice in causes criminal, and therefore may issue a *certiorari* unto inferior justices to remove indictments or appeals, and that is done for several ends.

1. Sometimes to consider and determine the validity of indictments, and to quash or affirm them, as there is cause.

2. Sometimes to have the prisoner or offender tried either at the bar, or by *nisi prius* before the king's justices of the courts of *Westminster*.

3. Sometimes to examine, and affirm or reverse the proceedings and judgments given by inferior judges, for it was frequent heretofore to have the record removed by *certiorari* first, and then a writ of error, *quod coram vobis residet*, tho it is now ordinarily done together by writ of error.

4. Sometimes to plead the king's pardon.

5. Sometimes

5. Sometimes to issue process of outlawry against the offender in those counties and places where the process of inferior justices cannot reach them.

Tho this be usual to remove records of indictments by *certiorari*, yet the chancellor may deliver an indictment removed before him, or the justices of peace, or other commissioners of *oyer and terminer* or gaol-delivery may deliver indictments taken before them *manibus propriis* without writ, and such a record so removed, and a record made of it removes the record.

If there be an indictment to be removed and the party be in custody, it is usual to have an *habeas corpus* to remove the prisoner, and a *certiorari* to remove the record, for as the cer- [211]
tiorari alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment, and therefore altho upon the *habeas corpus* and the return thereof the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return, yet they cannot on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itself be removed by *certiorari*, but the same stands in the same force it did, tho the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment, and the court below may issue new process upon the indictment, tho it be otherwise in an *habeas corpus* in civil causes, for it is a *superfedeus*, and closeth up the hands of the inferior court in civil causes.

By the statute of 1 & 2 of *P. & M. cap. 13.* an *habeas corpus* or *certiorari* to remove a prisoner or a recognizance ought to be signed with the proper hand of the chief justice, or in his absence by one of the justices of the court, out of which it issues.

By the statute of 21 *Jac. cap. 8.* all *certiorari's* to remove indictments before justices of the peace, shall be delivered at the quarter-sessions in open court, and the party indicted shall become bound with sufficient sureties in ten pounds to the prosecutor, with condition to pay him such charges as the justices of peace shall assess, if the party be convicted, otherwise the justices of peace may proceed to trial notwithstanding such *certiorari*.

A *certiorari* may issue to the justices of a county palatine, or to the mayor of the *cinque ports* to remove an indictment taken before them,

and must not be directed to the chancellor of *Durham*, &c. or warden of the *cinque ports*, for now by the statute of 27 H. 8. cap. 24. all commissions of the peace, gaol-delivery, oyer and terminer, &c. are to be made in the king's name, and these justices in criminal [212] causes are immediately subject to this court, as other justices of like nature elsewhere are; and if they return a privilege of the county palatine or *cinque ports* upon the *certiorari*, it shall not be allowed, but an *aliàs certiorari* shall issue with a precept to produce their charters, by which they claim such exemption, *P. 43 Eliz. B. R. Rot. 119. T. 8 Car. B. R. (a)*, and *M. 8 Car. B. R. (b)* upon an indictment of sodomy in the *cinque ports*. *T. 1653. Rutabie's case* upon an indictment of murder in *Durham (c)*.

A *certiorari* issues bearing *teste* the last day of *Trinity term* to remove all indictments against *A.* and *B.* returnable *tres Michaelis*; at the quarter-sessions it is deliverd, and then an indictment is found against *A. B.* and *C.*

Ruled 1. That tho the delivery of a *certiorari* supercedes the proceeding upon an indictment, yet it doth not hinder the taking of an indictment after the delivery of the writ.

2. Altho the indictment be taken after the *teste* of the *certiorari*, and before or after the delivery thereof, yet all such indictments against *A.* and *B.* ought to be removed, and the justices below cannot proceed upon such indictments to trial, judgment, or execution; and if they do, it makes their proceedings erroneous and void, and likewise subjects the justices to an attachment for the contempt, whether they proceed at the same sessions, or a private sessions after.

3. That such a *certiorari* to remove all indictments against *A.* and *B.* removes all indictments wherein *A.* or *B.* are indicted either alone or together with any other person. *M. 22 Car. 1. B. R. Orfener's case (d)* adjudged. 1 R. 3. 4. b. 6 H. 7. 16. a.

If *A. B.* and *C.* are indicted (suppose for a battery), ruled, 1. Tho *A.* alone tenders security for the costs, it is sufficient within the statute, and the record ought to be removed into the king's bench. 2. If the indictment be at a private sessions, this indictment ought to be deliverd into the quarter-sessions, yet the delivery of the *certiorari* at

(a) *Hopkil Tilden's case*, 1 R. A. 395. pl. 6.

(b) *Dugdale's case*. *ibid.*

(c) *Vide supra*, Part I. p. 467. and also

Simpson's case, 1 R. A. 395. pl. 5.

(d) The same points resolved in *Cbeney's case*, 1 R. A. 395. pl. 1, 2.

the private sessions closeth the hands of the justices, altho the allowance of the writ and the tender of the security must be by the statute at the quarter-sessions. *M.* 165 3. *B. R.* adjudged.

Nota, T. 15 Car. 1. B. R. in *Hancock's* case these points were resolved. 1. That if many are indicted, and one only tenders sureties for the costs upon the statute of 21 *Jac.* it is sufficient.

2. If the surety be sufficient as to 10*l.* that is a sufficient surety, and ought to be allowed by the justices of peace.

3. A *feme covert* is not within the statute of 21 *Jac.* to find sureties.

4. If a *certiorari* issue and ought to be allowed, the proceeding of the justices after is *coram non iudice*.

5. It was resolved *M. 4. Car.* that the removal of an indictment of forceable entry by the prosecutor is not within the statute of 21 *Jac.*

And so note a difference between a writ of error and a *certiorari*, the former is a *superfedeas* to the issuing of execution from the time of the delivery of the writ till the day of the return be past, but then if the plaintiff proceed not to the removal of the record, execution shall be granted for his delay; but a *certiorari* is a *superfedeas* from the time of the delivery thereof for ever, unless a *procedendo* issue. 21 *H. 6.* 28. *b. Dy.* 245. *a.*

If at the sessions of the peace an indictment of forceable entry be, and restitution be awarded, and after the sessions and before restitution actually made a *certiorari* is delivered to one justice of peace, before the statute of 21 *Jac.* it closed up their hands, and no restitution shall be awarded, but the justice ought to make a *superfedeas* thereupon.

And it seems the same law still remains at this day upon indictments of forceable entry found at private sessions, because the justices make execution thereupon before any quarter-sessions come by virtue of the statute of 8 *H. 6. cap. 9.* and if the *certiorari* should not be obeyed, it would be fruitless.

If *A. B. C.* and *D.* be actually indicted in one indictment for one offense, and a *certiorari* be to remove all indictments against *A.* and *B.* this will be sufficient to remove the indictment [214] against *A.* and *B.* and also it removes the indictment as to *C.* and *D.* for the justices may deliver the indictment *per manus proprius.* *M.* 37 & 38 *Eliz. B. R. Woodward's* case, *contra* 6 *E. 4.* 5. *a.*

But if the indictment be but one, but the offenses several, as if *A. B. C.* and *D.* be indicted by one bill for keeping several disorderly houses, a *certiorari* to remove this indictment against *A.* and *B.* re-

moves not the indictment as to *C.* and *D.* for tho they are all comprised in one bill, yet they are several indictments and several offenses, and so the record is in the king's bench virtually and truly as to *A.* and *B.* but as to *C.* and *D.* the record remains below.

But if the justices *per manus suas proprias* deliver the bill into court against all of them as they may, then if a record be made of that delivery, the indictment is entirely removed against *A. B. C.* and *D.* because not done upon the writ of *certiorari*, but *per manus suas proprias*: But otherwise it is, where the offenses are several, and the indictment against *A.* and *B.* is removed by writ, and by a return indorsed upon the writ, for then that single indictment, that concerns *A.* and *B.* is removed, and not the others, where the offenses are several, and severally charged.

But as I said, if there be one indictment against *A. B. C.* and *D.* for one murder or burglary, another against the same persons for robbery, and a third against the same persons for a rape, a *certiorari* to remove all indictments against *A.* and *B.* removes all these several indictments against *A. B. C.* and *D.* for tho in law each of them be severally a felon, yet inasmuch as they are jointly charged they shall be all removed as to *A. B. C.* and *D.* by virtue of this one writ, contrary to the opinion of *Markham.* 6 *E.* 4. 5. *a.*

And yet in some cases variance between the *certiorari* and the record causeth the record not to be removed, as if the *certiorari* be to remove the record of an inquisition *in curiâ nostrâ*, whereas it was *in curiâ* of the predecessor, the record is not removed. 3 *Eliz. Dy.* 206. *b.*

[215] So if it be to remove an indictment for stealing of two horses, and the record is but for one. 3 *Affiz.* 3. *Plow. Com.* 393. *a.*

If a *certiorari* issue, it is a *superfedeas* in law, and it makes judicial proceedings after the *certiorari* delivered erroneous, but possibly it makes ministerial proceedings, as the award of restitution in a forceable entry, void also; vide 6 *H.* 7. 16 *a.* per *Keble*, altho it doth not remove the record before the return. *Dy.* 245. *a.*

After a *certiorari* issued and delivered, and before the record removed the inferior judge may be enabled to proceed by a *procedendo* or *superfedeas* of the *certiorari* issuing out of the court of king's bench.

But if the record be removed and filed in court, at common law no *procedendo* could be granted, neither could the record be remitted, but now by the statute of 6 *H.* 8. *cap.* 6. the court of king's bench may remand

remand the record, and command the judges below to proceed upon the indictment so remitted.

And *note* the difference between a *certiorari* in the king's bench and chancery: In the king's bench the very record itself is removed, and that which remains in the court below is but a scroll. But usually in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record, and therefore if the tenor of a record of an indictment, or attainder, or conviction be removed by *certiorari* into the chancery, and thence sent by *mittimus* into the king's bench, they cannot thereupon proceed either to judgment or execution, because they have only the tenor of the record before them, and not the record itself, as in the former case. *Vide* 37 H. 6. 17. 39 H. 6. 4. Dy. 217. a. 2 E. 3. 21. a. (c).

(c) *Vide* Dyer 369. b.

Burn. Tit. Certiorari. 4. Blackf. Com. ch. 19. p. 262. 265. 272. ch. 24. pa. 320, 321. Index to 2 Hawk. P. C. Tit. Certiorari. See the several Index's of 1, 2, 3, & 4. Reports of Sir James Burrow, & Rep. tempt. Lord Hardwicke 396.

C H A P. XXVIII.

[216]

Touching the arraignment of offenders in capital offenses.

IN the former chapter I have shewed how the prisoner is to be accused, namely, by indictment, and how to be brought in by process to his answer, and how to be dealt with, if he make default, or stand out against the process of law

I am now to consider how he is to be proceeded against, if he be taken, or render himself, and appear in court.

For in case of an indictment of treason or felony no offender can appear by attorney, but in person, tho in some cases of other indictments after plea pleaded, the defendant may appear by attorney. 9 E. 4. 4. a. 22 Affiz. 73. B. Attorney 63.

When the offender in treason or felony comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the gaoler of another prison, the first thing that follows thereupon, is his arraignment.

And herein I will consider, 1. What the arraignment of a prisoner or malefactor is. 2. How it is performed, and in what manner. 3. When it is to be done,

I. Arraignment therefore is nothing else but the calling of the offender to the bar of the court to answer the matter charged upon him by indictment or appeal.

And the word in *Latin* is no other than *ad rationem ponere*, and in *French* *ad reson*, or abbreviated *a resn*, for as the *vox forensis* *disrains* or *derayn* used antiently in our books *de eco tend suit* & *derayne* imports in *Latin* *disrationare* to disprove or evince the contrary of any thing, that is or may be affirmed, see *Spelman's Gloss.* tit. *Dirationare*, [217] and *Selden's* notes upon *Fortescue*, cap. 21. p. 23. so arraigne is *ad rationem ponere* to call to account or answer.

And this appears to be the true sense and etymology of the word, by the excellent record of the reversal in parliament of the judgment given against the *Mortimers*, E. 2. the reversal and whole record is entered *verbatim* Patents 1 E. 3. part 2. m. 3. where there are three errors assigned in that arbitrary judgment, and all ruled in parliament to be errors, and the attainder reversed. 1. *Quòd cum aliquis de regno regis tempore pacis deliquerit erga dominum regem vel alium, per quod debeat vitam vel membrum perdere, & super hoc coram iudicibus in iudicium ductus fuerit, primò debeat poni rationi & super delicto sibi imposito responsiones ipsius audiri, priùs quam procedatur ad iudicium de eo; sed in recordis & processibus prædictis continetur, quòd prædicti Rogerus & Rogerus coram iusticiis ducti adjudicati fuerunt iudicio tractus & suspendii, & postea perpetuæ prisonæ adjudicati & mancipati absque hoc, quòd ipsi fuissent inde arrenati, seu quòd ipsi ad aliqua eis imposita respondere possint, quod est contra legem & consuetudinem regni, &c. per quod ad iudicium de eis erroneè processum est.*

2. *Dicit etiam quòd in recordis & processibus prædictis continetur, quòd dominus rex recordabatur versus ipsos Rogerum & Rogerum, quòd ipsi hostiliter equitaverunt cum Humfredo de Bohun nuper com' Heref. & aliis inimicis domini regis contra ipsum regem & populum regni sui diversa mala & facinora perpetrando, quare iudicia prædicta super eisdem reddita fuerunt, cuiusmodi recorda non est domino regi facere, nisi de inimicis suis tempore guerræ, & hoc, viz. quando idem dominus rex equitat cum vexillis explicatis, & non tempore pacis, sed eo tempore dominus rex non equitavit cum vexillis explicatis, nec fuit tempore guerræ, cancellario domini regis & iusticiariis placarum de utroque banco sedentibus*

bus ad justitiam unicuique conqueri valenti & prosquenti faciend', per quod ad judicium de eis, ut prædictum est erroneè processum est. 3. Dicit etiam quòd erratum est in hoc, quòd, cum in Magna Charta de libertatibus Angliæ continetur, quod nullus liber homo capiatur, aut imprisonetur, aut de libero tenemento suo dissiçiatur, vel de libertatibus vel liberis consuetudinibus suis, aut utlegatur, aut exulet, aut aliquo modo destruatur, nec dominus rex super eum ibit, nec super eum [218] mittet, nisi per legale judicium parium suorum vel per legem terræ, sed in recordis & processibus prædictis continetur, quòd prædicti Rogerus & Rogerus sigillatim judicio tractus & suspendii adjudicati fuerunt, & postea perpetuæ prisonæ adjudicati & mancipati absque legali judicio parium suorum ad hoc vocatorum, & contra legem terræ. And there-upon judgment of reversal is given in these words, *Et quia inspectis recordis & processibus prædictis compertum est in eisdem, quòd prædicti Rogerus Mortimer & Rogerus Mortimer coram justic' ducti judicio tractus & suspendii adjudicati fuerunt, & postea perpetuæ prisonæ adjudicati & mancipati absque hoc, quòd ipsi ad aliqua eis vel eorum alteri imposita possint respondere, & hoc tempore pacis, & absque hoc, quod dominus rex equitavit cum vexillis explicatis, & cancellario domini regis & justic' de utroque banco sedentibus, ut prædictum est, & absque legali judicio parium suorum, quod est contra legem & consuetudinem regni Angliæ & tenorem Chartæ prædictæ, consideratum est per dominum regem nunc & ejus concilium in pleno parlamento, quod omnia judicia prædicta ob defectus & errores prædictos & alios in recordis & processibus prædictis compertos revocentur, &c.*

I have transcribed the record more at large, because there are many useful parts in it, some whereof will be useful to other purposes.

But as to the business in question, these two things are observeable.

1. What arraignment is, namely, it is *ad rationem ponere*, for that which in one part of the record is *arrenatus*, is before rendered *rationi ponere*, to be put to answer; and therefore *Spelman*, who is seldom mistaken, is yet herein mistaken, both in the nature, orthography, and etymology of the word, which he saith is *arramare* or *adramare*, for it is nothing so. 2. Of what importance, and how essential it is, that in capital offenses the offender being in court should be arraigned or put to answer; the want whereof rendered the judgment given against the *Mortimers* erroneous, and reversed by the king and his parliament.

The arraignment of a prisoner, therefore, consists of these parts:

1. The calling the prisoner to the bar by his name, commanding him to hold up his hand, which tho it may seem a trifling circumstance, yet it is of importance, for by holding up his hand *constat de personâ indictati* and he owns himself to be of that name (*a*).

2. Reading the indictment distinctly to him in *English*, that he may understand his charge.

3. Demanding of him whether he be guilty or not guilty; and if he pleads *not guilty*, the clerk joins issue with him *cul. prist.* and enters the prisoner's plea; then he demands how he will be tried, the common answer is, *by God and the country*, and thereupon the clerk enters *po. se.* and prays to God to send him a good deliverance.

But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as *misnomer*, *auterfoits acquit*, *auterfoits convict*, a pardon, &c. then he pleads it without immediate answering to the felony: but in some cases *si trove ne soit*, then to the felony *not guilty*, *de quo poslea*. And thus far what the arraignment is.

II. How to be done or performed.

On the part of the court, what is to be done is shewn before, but in relation to the prisoner and his coming to the bar.

The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons, and all manner of shackles or bonds. *Stamf. P. C. fol. 78. a. 2 Co. Inst. 316. Co. P. C. p. 34, 35. Braet. Lib. III. fol. 137. a. & alios libros ibi*, unless there be a danger of escape, and then they may be brought with irons.

But *note*, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment (*b*)

III. When the party is to be arraigned.

[220] In case of murder at the common law, the judges did usually forbear to arraign the prisoner upon an indictment till the year and day were past, whether an appeal were depending or not *per omnes justic' Angliæ*, 22 E. 4. *Coron.* 44. unless the evidence were very clear

(a) The ceremony of holding up the hand is not required in the case of a peer, nor is it of absolute necessity in the case of a common person, it being sufficient that it appears to the court who is the person indicted. See lord *Delamere's* case, *State Tr. Vol. IV. p. 211.* and lord *Mobun's* case, *State Tr. Vol. IV. p. 588.*

(b) By this it appears to have been our author's opinion, that upon whatever occasion a prisoner be brought into court, he

ought not to stand there *in vinculis* till after his conviction, when he comes to receive judgment, nor even at the time of his arraignment, (for that is the time our author is here discoursing of), yet in *Jayer's* case, *Mich. 9 Geo. 1. E. R.* a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner in that case stood at the bar in chains during his arraignment. See *State Tr. Vol. VI. p. 230, 231.*

to convict him, and no appeal depending: or altho an appeal were depending, if the appellant were an infant. 21 E. 3. 23. b. *Stamf. P. C. fol. 107. a.* because of the delay.

But now by the statute of 3 H. 7. cap. 1. the justices shall proceed to try him upon an indictment of murder (or manslaughter) tho within the year, and if acquitted, yet he shall not be discharged, but at the discretion of the justices shall be continued in custody, or upon bail, till the year and day be past.

So that by this statute *auterfoits acquit* of principal or accessory, or *auterfoits attain* of the principal upon an indictment is no bar to an appeal, but *auterfoits acquit* upon an appeal remains a bar to an indictment for the same offence.

But *auterfoits convict* upon an indictment, and having had his clergy, is a good bar to an appeal notwithstanding this statute, *de quo infra*; and yet in favour of an appeal, if a man be indicted of murder, and plead to it, and be convicted, if the wife enter an appeal for the same death against the prisoner, as long as that appeal is depending, judgment shall be respited; but if the wife be nonsuit in her appeal, then judgment shall be given upon the conviction. *Vide M. 12 & 13 Eliz. B. R. Dy. 296. a. Stanley's case.*

But as to other indictments, as of robbery, &c. the same remain at common law, as before this statute, yet it is the constant course, unless an appeal be depending, to arraign the prisoner upon an indictment within the year; for now by the statute of 21 H. 8. cap. 11. the party robbed hath as effectual restitution of his goods upon his prosecution of an indictment, as upon an appeal; and so an appeal of robbery is rarely brought. [221]

Nay, tho an appeal of robbery be brought by writ, the justices will not stay the arraignment of the prisoner upon the indictment, unless it be by bill, or that the plaintiff in an appeal by writ hath declared upon the writ, because the writ is general, and it cannot appear what the goods are till declaration; but in an appeal of death by writ the person killed is certain, 31 H. 6. 11. a. *Stamf. P. C. Lib. II. cap. 36. fol. 107. a.*

If a man be indicted and appealed before the same justices for the same murder or other felony, the party shall be arraigned upon the appeal first, and not upon the indictment, in favour of the appellant, as I have said; but if the appellant be nonsuit upon his appeal, the pri-

soner shall be arraigned upon the appeal (*c*), and process shall cease upon the indictment. 4 E. 4. 10. a. And it shall be entered *cesset processus* upon the indictment, 4 E. 4. 10. a. And if the prisoner plead, and be acquitted, or plead the king's pardon, and it be allowed, regularly the acquittal or pardon, and the allowance thereof shall be entered upon the appeal, tho it be safe to enter it likewise upon the indictment; and therefore if in that case, thro the mistake of the clerk, there be no entry of *cesset processus* upon the indictment, and the indictment lying thus open, there be process of outlawry made upon the indictment, and the party be outlawed, he hath no remedy but to bring a writ of error upon the outlawry, and he may assign for error his acquittal upon the appeal, and aver it to be the same felony, and upon confession of the king's attorney, it shall be reversed. 4 E. 4. 10. a.

If there be an inquisition before the coroner of murder, and returned, and likewise an indictment for the same offense by the grand inquest, it is usual to arraign the prisoner upon the indictment, but he may be arraigned upon both at the same time; but if arraigned upon the indictment only, there ought to be an entry of *cesset processus* upon the coroner's inquest as to the prisoner, who may otherwise be outlawd upon it.

[222] If a prisoner be found guilty of murder by the coroner's inquest, and a bill of indictment of murder be against him at the sessions of gaol-delivery for the same murder, it is usual to arraign him upon the coroner's inquest, and not upon the indictment, and if he be acquit upon that, then to arraign him upon the bill, and put him to his plea of *autrefois acquit*.

But to avoid the trouble of a double arraignment and plea, I have observed this course.

1. If one indictment be of manslaughter, and the other of murder, then to arraign him of that offense, which is highest, and spare the other.

2. If both be of murder, but one is insufficient, as for the most part coroners inquests are, then to arraign him upon the good indictment, and quash the other.

3. If both presentment and indictment be of the same nature, and both (for instance) of murder, and both good, and both returned into court the same sessions, I have usually arraigned the prisoner upon both (so as they be put upon the same inquest to be tried), to avoid

(c, At the suit of the king.

the

the trouble of the plea of *auterfoits acquit* or *attaint*, and to indorse his acquittal or attainder upon both presentments, always directing the jury to acquit him upon both, if acquitted upon one, and *e converso*.

Now concerning the arraignment of the accessary; regularly the accessary shall not be arraigned, nor put to answer till the principal be attaint by outlawry or confession, or be convict, and attaint also by judgment upon verdict; for it is an offense dependant upon the principal; and altho the principal be convict, yet if he have his clergy, the accessary is discharged thereby, and shall not be arraigned. 2 Co. Inst. 183. *super stat. Westm' 1. cap. 14.*

But yet the principal and accessary being indicted by one or several indictments, and both appearing, may be arraigned together at the same time (*d*), and both pleading not guilty, the same jury [223] shall be charged with both, and directed to inquire of both, *viz.* first of the principal, and if they find him guilty, then to enquire of the accessary 9 Co. Rep. 119. *a.* lord Sanchar's case. 2 Co. Inst. 184. *super stat. Westm' 1. cap. 14.*

But if *A.* and *B.* be indicted for murder, *A.* as giving the stroke, and *B.* as being present, aiding, and abetting, if *A.* flies, and *B.* is apprehended, *B.* may be arraigned and tried before *A.* be attainted by outlawry, tho he be principal but in the second degree, for they are both principals; and so it was done in the case of *Thady*, *H. 25 & 26 Car. 2.* tho in point of discretion it is good to try them both together.

If *A.* be indicted of high treason, and *B.* be indicted for receiving or comforting him, or procuring, or abetting (but not present), here it is true they are all principals; but in as much as *B.* in case of a felony would have been but accessary, and it is possible that *A.* may be acquitted of the fact, it seems to me, that *B.* shall not be put to answer of the receipt or procurement till *A.* be outlawd, or at least jointly with *A.* (*e*), and in this case the same jury may be charged with both, and their charge shall be first to inquire whether *A.* were guilty, and if not, then to acquit both *A.* and *B.* and if *A.* be found guilty; then that they inquire of *B.* And in *Somervill's* case, 26 *Eliz. (f)*, mentiond before, the inquiry was first of the principal offender, and then of the receiver or procurer to avoid that inconveni-

(*d*) They may be, but not necessarily must, as was laid down for law by C. J. *Pemberton* in the trial of Count *Conin's* mark. See *State Tr. Vol. III. p. 465.* and Sir *John Hawle's* remarks thereon, *State Tr. Vol. IV. p. 199.*

(*e*) Yet in lady *Lisle's* case, *State Tr. Vol. IV. p. 105.* it was without any foundation in law practised quite contrary. *Vid: supra, Part. I. p. 238. in notis.*

(*f*) 1 And 109.

ence and *awerouft*, that might happen in cafe *B.* were first convict of the procurement and receipt, and yet poffibly *A.* might be acquitted of the principal fact.

If the principal do not plead *not guilty*, but fome other plea, as in abatement, or in bar, the accessary fhall not be put to plead till the plea of the principal be determind. 9 *H.* 7. 19. *b.* but if the principal plead *not guilty*, then the accessary, if present, fhall be put to plead presently, and they may be tried by the same inquest, *ut supra*.

[224] In antient time, if the principal made default, and appeared not, the accessary was not put to answer. 44 *E.* 3. 7. *b.* *Coron.* 216. But of later times the accessary, if he appear, hath been arraigned and put to plead, but process against the inquest, and trial ceaseth till the principal come in or be attaind by outlawry. 9 *H.* 4. 2. *a.* 7 *H.* 4. 36. *a.* *Stamf. P. C. Lib. I cap.* 49. *fol.* 46. *a.*

But the accessary may pray process against the principal, & *renunciari juri pro se introducto*, and his consent makes it not error, 8 *H.* 5. 6. *b.* *Coron.* 463. and therefore, if the accessary be acquitted before the principal tried, it is agreed, that it is a good acquittal, and by the same reason, if he were convict, it is a good conviction, yet no judgment shall be given against him upon that conviction till the principal tried.

And upon this reason it is, that if *A.* be arrested or in prison for felony, and *B.* rescue him, or the gaoler suffers him voluntarily to escape, tho this be a distinct felony in *B.* the rescuer, and in the gaoler that voluntarily suffers him to escape, for which they may be presently indicted, yet they shall not be arraigned or put to answer till *A.* be convicted and attaind by judgment, or outlawd. 1 *H.* 7. 6. *a.* 1 *E.* 3. 16. *b.* 2 *Co. Instit.* 592. *super stat. de frangentibus prisonam*; for if *A.* be acquitted upon the indictment, the rescuer or gaoler shall be discharged.

But if *A.* be indicted of the felony, or not indicted, and be lawfully imprisond and break the prison, he may be indicted and arraigned for his felony in breaking the prison, before his conviction of the felony for which he was committed. 2 *Co. Instit. ubi supra*.

And yet, if after that indictment *A.* be arraigned of the principal felony, and acquitted, he may plead that acquittal of the principal felony in bar to the indictment for the breach of prison; *vide rationem supra, Part I. cap.* 54. *p.* 611.

If a *capias* be awarded against a felon, and he render himself and plead not guilty, and is let to bail, and then makes default, a *capias ad audiendam juratam* shall issue; and if he be brought in, he shall be brought in upon his plea, but it is said by *Scot*, that if he had rendred himself upon the *exigent*, and pleaded not guilty, and been let to bail till the trial, and then made default, [225] whereupon an *exigent* is awarded, and the felon is brought in upon the *exigent*, he shall plead *de novo*, and consequently be arraigned *de novo*, for by the *exigent* awarded, the first issue is discontinued. 16 *Affiz.* 13.

See 4 Blackf. Com. ch. 25. Of arraignment and its incidents, Burn. Tit. Arraignment and Index to 2 Hawk. P. C. tit. Arraignment.

C H A P. XXIX.

Concerning the plea of the prisoner upon his arraignment, and first of his confession of the fact charged, and approving others.

WHEN the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

The confession is either simple, or relative in order to the attainment of some other advantage.

That which I call a simple confession is, where the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 *Affiz.* 40.

If it be but an extrajudicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus shewn it appear to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty*. 22 *Affiz.* 71. *Stamf. P. C.* [226] *Lib. II. cap. 51. fol. 142. b.*

A con-

A confession in order to some other advantage, is either where the prisoner confesseth the felony in order to his clergy, *de quo infra*, cap. 44. or where he confesseth the offense, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvement, which I shall here open in the order that Mr. *Stamford* hath gone before me.

1. Of what offenses a man may be an approver. 2. In what suits. 3. At what time. 4. Before whom. 5. In what manner. 6. How he shall be orderd before and after his appeal. 7. What process shall issue against the party appeald. 8. What pleas he shall have, and how tried. 9. How proceeded in. 10. What judgment shall be given for or against the appellor or appellee.

Before I come to these particulars, we are to know, that it is purely in the discretion of the court to admit the approver to appeal or not, or to give him any respite from judgment or execution upon his confession and approvement; for otherwise it would be in the power of any party arraigned for felony by becoming an approver to delay judgment, where (it may be) his appeal is but feigned, for the admission of his appeal or respite of judgment is but a matter of grace and discretion. 21 H. 6. 34. b. *Coron.* 66 & 67. *per omnes justic' utriusque banci.* Co. P. C. cap. 56. p. 129.

And therefore this course of admitting of approvers hath been long disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men, and therefore provision made against it by 1 E. 3. cap. 7.

And upon this reason it is, that as of later times the admission of such appeals hath been wholly disused, so in times when they were admitted, a great strictness was held upon such appeals, as [227] will appear upon the examination of the ensuing particulars.

I. Therefore touching the offenses, whereof an approvement may be.

It may be only of capital offenses, as of treason or felony, whether they be at common law, or by act of parliament.

When a prisoner is admitted to be an approver, he is sworn in court to approve, or rather to discover all felonies and treasons that he knows,

knows, and a certain time prefixt (as three or four days), to make his appeal, and a coroner assigned to him to receive such his appeal and discovery. 12 E. 4. 10. *b*.

And yet the appeal is not good as an appeal, or as an approvement to compel the parties appealed to answer, but only as to such felonies or treasons that were committed by the appellee together with the appellor, and whereof the appellor stands indicted in court, and as to other treasons or felonies, [than] whereof the appellor so stands indicted, it is no legal appeal or approvement to put the appellee to answer.

And therefore if *A.* being indicted for robbing of *B.* and he appeal *C.* that he robbed *A.* himself, this is a void appeal, and the appellor shall be executed, and the appellee shall not be put to answer to it. 25 E. 3. 39. (*a*).

So if he appeal *C.* as accessary to the robbery of *B.* either before or after, *C.* shall not be put to answer, for it is not the same felony charged upon *A.* but only an accessary to it. 10 E. 4. 14. *a*.

So if *A.* be indicted of felony, and he appeal *B.* of treason, *B.* shall not be put to answer that appeal; but *B.* being so accused, it may be a ground for the justices in point of discretion to make *B.* find sureties for his appearance at the next sessions, or in the king's bench, and in the mean time to be of good behaviour towards the king and his people, as was done when a person that had abjured for felony, made such an appeal of treason. *M.* 19 E. 2. *Coron.* 387. *vide simile* 21 E. 3. 18. *a.* *Coron.* 449.

II. In what suits.

Approvement lies not in an appeal of felony, for the de- [228]
lay that may come thereby to the plaintiff. *M.* 15 E. 3. *Coron.* 113. 2 R. 3. 22. *b*. And therefore, if a party be indicted of felony, and the prisoner becomes an approver, if an appeal for the same felony be sued afterwards, all proceedings upon the approvement shall stay. 8 H. 5. *Coron.* 442.

But if *A.* be indicted of felony, and he becomes an approver, and appeal *B.* as a companion with him in the same felony, and *B.* comes in, it seems he may not become an approver, and appeal *C.* of the same felony, 15 E. 3. *Coron.* 113. *Stamf. P. C. Lib.* II. *cap.* 58. *fol.* 147. *a.* tho 11 H. 4. 93. *b.* *B. Coron.* 34. seems to be contrary.

If a man be arrested and imprisond for fuspicion of felony, he can- not become an approver, because he is not indicted. *Stamf. P. C. Lib. II. cap. 55. Co. P. C. cap. 56. p. 129.* against the opinion of *Strange and Hankf. 6 H. 6. Coron. 231.*

III. At what time a man shall become an approver.

After a person is abjured for felony, 19 *E. 2. Coron. 387. 19 E. 3. Ibid. 443.* or be outlawd, 21 *E. 3. 17. b. Coron. 452.* or otherwise attaind, and hath his clergy, 17 *E. 3. Coron. 445.* he shall not be admitted to be an approver; nor one convict by verdict. 19 *H. 6. 47. b. Coron. 8.*

If *A.* be indicted of felony, and plead *not guilty*, and put himself upon the country, and the jury is charged with him, yet before the evidence fully heard, and the jury gone from the bar, he may be admitted to be an approver. 12 *E. 4. 10. b. 11 H. 7. 5. b. per omnes justic' : vide contra 2 H. 7. 3. a. (b), 9 H. 5. Coron. 440.*

But if the whole evidence be heard, then he shall not be admitted to be an approver, 21 *E. 3. 18. Coron. 449. 2 H. 7. 3.* so that it seems much in the discretion of the court to admit him to be an approver

[229] at any time before verdict given, tho after *not guilty* pleaded. 12 *E. 4. 10. b. in B. R. & 11 H. 7. 5. b. per omnes justic'*, which is of greater weight than the other books.

IV. Before whom a man may become an approver.

It may be before the justices of the king's bench, or justices of gaol-delivery, or justices in *eyre*, for they may assign a coroner to the prisoner to receive his appeal.

But it cannot be in inferior courts, as those that have *foke* and *sake*, and *infangtheft*, and *utfangtheft*. *Braet. Lib. III. cap. 35.*

But in case of a royal franchise, as a county palatine, or the royal franchise of *Ely*, where the bishop hath justices and coroners of his own making, there a felon may become an approver. 29 *E. 3. 42. a. Coron. 462.* in the case of *Ely*.

Neither can a man become an approver before justices of peace, nor *oyer* and *terminer*, for they cannot assign a coroner. 9 *H. 4. 1. Coron. 457. 4 Co. Infit. 165. 169. Co. P. C. 130.*

V. The manner of approver, and of the allowance of it.

(b) In this case the whole evidence had been given, and the jury gone from the bar, which was one reason assigned by the court, why they could not admit the prisoners to become approvers; so that this

case no way contradicts what is before said; but there was another exception besides, on which the court laid the greatest stress, because they only prayed a coroner, but did not acknowledge the felony.

Before

Before any man shall be admitted to be an approver, he must confess the indictment in open court, and pray a coroner to be assigned him, and regularly this is to be done upon his arraignment, before plea pleaded, tho, as hath been said, his confession hath been sometimes admitted after *not guilty* pleaded. 11 *H.* 7. 5. *b.* 12 *E.* 4. 10. *b.* and therefore if he hath pleaded before *not guilty*, and then prays a coroner without confessing the felony, the inquest shall be taken, and if found guilty he shall be executed. 2 *H.* 7. 3. *a.* adjudged; and if he hath not pleaded to the country, but prays a coroner, and will say no more, he shall have *peine fort & dure*, tho the book of 1 *H.* 5. *Coron.* 441. be that he shall be hanged.

Upon confessing the felony, and praying a coroner to be assigned, the court doth these things.

1. They assign him a coroner to take his appeal. 2. They prefix him a time to make his appeal, sometimes three, sometimes four days. 8 *H.* 5. *Coron.* 439. 12 *E.* 4. 10. *b.* 26 *Affiz.* 19. 3. He shall be removed out of the strait custody, and make his appeal before the coroner, that he may not have any just pretence to say it was by duress or constraint, 12 *E.* 3. *Coron.* 169. and therefore, [230] if upon the coming back of the approver to the court, he wave his appeal, as being made by duress and against his will, the coroner shall be examined touching it upon oath; and if he affirm it was made *de bon grèc*, the appeal shall stand, but the approver shall be hanged. 22 *E.* 3. *Coron.* 255. 12 *E.* 3. *Coron.* 169. 4. The coroner must put his appeal into form, and when the prisoner comes back into the court, he must repeat his appeal, and shall not be helped by the court or any by-stander, 26 *Affiz.* 19. and if he miss in repeating his appeal in any matter of moment, as the colour of the horse, &c. he shall be hanged; for if he mistake in such circumstances, which must need come from his own memory and information, it is a sign it is feigned. 5. If he make not his appeal before the coroner in the time prefixed, he shall be hanged; and if he make it, and disavow it when he comes into the court, he shall, upon the examination of the coroner upon oath, be hanged. 6. If he appeal one, who by his own confession is not in the kingdom, he shall be hanged. 2 *E.* 3. *Coron.* 153. for he cannot be attaint at his suit. 7. After his appeal made he shall have an allowance of 1 *d.* *per diem* by the book of 12 *E.* 4. 10. *b.* 26 *Affiz.* 19. 8 *H.* 5. *Coron.* 439. th. 2 half-pence

per diem per Britton, and by *Fortescue* 21 *H.* 6. 34. *b.* nothing at all, till he hath convicted the appellee.

VI. Touching process upon an appeal by an approver.

It is to be known, that altho a coroner cannot receive an original appeal but of such felonies as are committed in that county whereof he is coroner, yet if a felon become an approver, the coroner may take an appeal of any felony, tho committed in a foreign county. 9 *H.* 5. *Coron.* 437.

Altho it seems, that book is not law, for he can appeal only in the county where he is indicted, and he cannot be indicted in one county of a felony committed in another county, therefore *quære librum*; it seems it must be intended where *A.* is indicted in the county of *B.* and taken in the county of *C.* and there the coroner receives his confession and appeal, which possibly he may do without any [231] special assignment *virtute officii*, as he may take an abjuration of a prisoner in a foreign county.

But the coroner in that case cannot make process against the appellee in a foreign county, 29 *E.* 3. 42. *a.* *Coron.* 462. but he may in the same county, *Stamf. P. C.* 146. *a. b.*

And therefore the bishop of *Ely* having the royal franchise of *Ely*, and justices and coroners of his own, and also having franchise of *retorna brevium* in divers hundreds in the county of *Suffolk*, and likewise a gaol there, a felon indicted and in prison at *Ely* became an approver before the coroner of the franchise of *Ely*, and appeald one in the bishop's gaol in his hundred in the county of *Suffolk*, the coroner of *Ely* cannot make process to the bishop's bailiff of his liberty in the county of *Suffolk* to bring the appellee to *Ely*, which is in another county, *viz.* *Cambridgeshire*, adjudged 29 *E.* 3. 42. *a.* *Coron.* 462.

At common law it seems, if an approver appeal parties that are demurrant in a foreign county, there could be no process made but in the king's bench, by removing the record thither by the justices of gaol-delivery, before whom the parties became an approver.

But this is remedied by the statute of 28 *E.* 1. *de appellatis*, whereby power is given to justices of gaol-delivery to issue process to the sheriffs of foreign counties to take the appellees, and bring them before the justices in that county where the appellor is indicted.

If the appellor allege the place, whereof the appellees are, (as he must), and thereupon process issues to the sheriff of that county, and he return there are no such persons in his bailiwick, 25 *E.* 3. 42. *b.*

or *non sunt inventi*, 21 H. 6. 34. *b.* the approver shall have judgment and be executed, and he shall not be received to say they are in another county, and pray process thither. 22 E. 3. *Coron.* 460. for if he be once found false in what he saith, he shall not be credited in any thing, but his appeal shall be presumed untrue: *vide* 21 H. 6. 34. *b.* *Coron.* 456.

If the approver die before his appeal determind, or be executed for the felony, 21 E. 3. 18. *a.* 21 E. 3. 17. *b.* Co- [232] *ron.* 452. or hath the advantage of his clergy, 3 E. 3. *Coron.* 369. or disavows his appeal, and will not prosecute it, 21 H. 6. 34. *b.* 3 H. 6. 50. *b.* yet process shall be continued against the appellee at the king's suit, and the appellee, if he come in, shall be arraigned, for the appeal was well commenced, and it stands as an indictment, by reason of the great presumption that a man that confesseth himself guilty, would not charge another falsely to be companion with him in the same felony.

But if the appeal were never well commenced, as if the appellor were convicted by verdict or outlawry, *de quibus infra*, or if the king pardons the approver after the approvement made, and before trial, 47 E. 3. 16. *a.* *Stamf. P. C. fol.* 149. *a.* the appellee shall be discharged without arraignment at the king's suit, or further process upon the appeal; for now the approver having his pardon is sure to escape, and therefore shall not be trusted in his prosecution against another for the same felony. But of these matters farther under the next head.

If the appellee be returned *non inventus*, the appellor, as hath been said, may be executed, but process of outlawry shall issue against the appellee, as it seems not by one *capias* and *exigent*, but by *capias*, *alias*, *pluries* and *exigent*; *quære*.

VII. Touching proceedings upon the appeal after appearance of the appellee.

He that is appeald shall not be let to bail but in three cases: 1. If the approver be dead. 2. If the person appeald be of good fame. 3. If the appellor wave his appeal. *Westm.* 1. *cap.* 15. (*a*). *Stamf. P. C. Lib.* II. *cap.* 18. *Fol.* 74. *a. b.*

And therefore, if *A.* be severally appeald by two approvers, *B.* and *C.* indicted severally of several felonies, and *A.* join battle, and van-

quish *B.* yet he shall not be let to bail till the appeal of *C.* be determined. 25 *E.* 3. 42. *b.*

[233] When the appellee comes in he may take his legal exceptions to the insufficiency of the appeal, as that the appellor is not in prison but at large, 21 *E.* 3. 18. *a.* *Coron.* 448. 6 *H.* 6. *Coron.* 231. or that the appellor is within age, or above seventy years old, or a woman, or maimed, whereby the appellee loseth his trial by battle. *Stamf. P. C. cap.* 58. *fol.* 147. *b.* or that he is a clerk convicted, and hath not made his purgation. 17 *E.* 3. 13. *a.* or that he is abjured the realm. 19 *E.* 2. *Coron.* 387. or that he was convicted by verdict before he appealed of the same offense: *Vide Co. P. C. cap.* 56.

Also he may have all those exceptions, which an appellee at the suit of a lawful person either by writ or bill may have, as that the plaintiff is outlawd for another felony, or in a personal action, but if he hath obtained his pardon, the appellee shall be put to answer, as in another appeal. 21 *E.* 3. 17. *b.* but if the approver be pardoned that felony, upon which he makes his appeal, the appellee shall not be put to answer neither at the party's suit, nor at the suit of the king. 47 *E.* 3. 16. *a.* *ubi supra.*

If the appellee hath no exceptions to the appeal, or to the disability of the appellor, but pleads to the felony, he may put himself upon trial, either by battle, or by the country.

Touching the form of the trial by battle, I shall make no long narrative at this time, because it is an unusual trial at this day, and besides, it will come more aptly in another place.

If when battle is joined they come to the combat, and the appellee be vanquished, it is an attainder of the appellee, and the appellor shall have the benefit of the king's grace and a pardon *tanquam ex merito justitiæ.*

But if the approver appeals several persons, and they severally join battle, the appellor shall not have his pardon till he vanquish them all successively, for if he be vanquished by the last, or disavow his appeal against the last, he shall be executed. 41 *E.* 3. *Coron.* 98. 21 *H.* 6. 34. *b.* *Coron.* 456.

And note, that, if in the field when they come to battle, the appellor disavow his appeal, the approver shall be executed, and the appellee deliverd without being arraigned at the king's suit, for his dis-

disavowing in the field is *quasi* a trial in fact. 21 *H.* 6. 34. *b.* *Coron.* 456. *Stamf. P. C.* 148. *a. b.*

But if before the deraigning of battle the approver disavow his appeal, the approver shall be hanged, but the appellee shall be put to answer at the king's suit, for it may be the king hath other evidence besides the approver to convict him.

If *A.* becomes approver, and appeals *B. C.* and *D.* of the same felony, and in his combat with *B.* becomes recreant, *B.* shall be discharged, but the appeal shall stand against *C.* and *D.*. 41 *E.* 3. *Coron.* 98.

If three be indicted for the same felony, and they become approvers, and the appellee joins battle with them all, he shall perform it severally; but if he vanquish one of the appellants, he is thereby acquitted against all the rest, and the approvers shall be executed, and the appellee deliverd. 7 *E.* 3. 12. *a.*

But if the appeal be of several felonies, tho he vanquish one appellant, he must fight successively with the rest. 19 *H.* 6. 35. *a.* 47 *E.* 3. 5. *a.* for the charges are several by the several appellants.

If the appellee puts himself upon trial *per patriam*, the approver shall be sworn as well to the petit jury upon the trial when he gives his evidence, as well as make a general oath at the time of his first becoming approver, and hence he is called *probator*, (*quod tamen quære*, because he is a person convicted,) so that altho he were a partner in the offense, and tho he stand indicted of it, and tho he be convicted by his confession, yet he is admitted a witness upon his own accusation or appeal, and the reason is, because he accuseth himself by his confession, as well as he doth the appellee by his appeal, and therefore gains a probable credibility of his testimony.

And therefore *P.* 19 *Jac.* in the star-chamber, *Noye's Rep.* p. 154. in Sir *Percy Cresby's* case, one defendant, that accuseth not himself, is not admitted as a witness to convict his companion, but if he accuse himself, he is a witness against his companion.

But this testimony or evidence is not conclusive to the jury, for the jury may consider as well the credibility or not [235] credibility of the witness, as the matter he swears.

And altho it seems it is now no plea for the appellee to say, he is *boni nominis & famæ*, & in *franco plegio* & in *assisa domini regis*, & *habet dominum, qui ipsum advocet*, as it was in *Bracton's* time, it is

good evidence for the the prisoner, if there be no other evidence against him but the testimony of the approver; and therefore, if the appellor die, yet the king may proceed with the appeal, because tho he cannot have the testimony of the approver himself, yet there may be other evidence of the fact.

But yet, when the approver is dead after his appeal, and before trial, the party isailable, because much of the evidence, which may conduce to the conviction, namely the oath of the approver, is lost, and so less probability of his conviction.

If the approver be vanquished and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment must be entred upon his confession; for his bare confession of the felony is a conviction, it is true, but not an attainder tiil judgment given, *quòd suspendatur per collum*, which is not presently entred upon his becoming approver, but when either by trial, or for any other cause before shewn, the court thinks not fit to spare his execution.

And on the other side, if the appellee be convict by verdict or battle, or slain upon the field, yet judgment must be given, *quòd suspendatur per collum*. 8 E. 3. Judgement 225. And in that case, altho the life of the approver is saved, yet he shall be banished, unless he obtain the king's pardon. *Stamf. P. C. Lib. II. cap. 52.* lord Coke *P. C. cap. 56.* saith he shall have a pardon *ex debito justitiæ*, And thus far concerning approvers.

I should now consider the business of abjuration, which is always accompanied with a confession of the felony before the coroner, but because *that* was a kind of appendant to sanctuary, which is wholly and finally taken away by the statute of 21 *Jac. cap. 28.* I shall not incumber myself with that business.

See Index to 2 Hawk P. C. tit. Pleading. Index to 2 Hawk. P. C. tit. Approver. Burn: tit. Approver. 4 Blackf. Com. ch. 25. p. 329. ch. 27. p. 346. ch. 33. 418. Index to 2 Hawk. P. C. Tit. Battel.

C H A P. XXX.

Concerning the pleas of the prisoner upon his arraignment, and first, concerning pleas in abatement of the indictment.

THE prisoner upon his arraignment either confesseth, or pleads, or stands mute; the first of these is dispatched in the former chapter, the second matter comes now to be considered, *viz.* his pleas upon his arraignment.

Pleas upon the arraignment are of four sorts.

1. Pleas that are declinatory of his trial, and such were antiently the plea of privilege of sanctuary, and the plea of clergy; the former is taken away by the statute of 21 *Jac. cap.* 28. the latter stands still in force; but because for the most part that benefit is claimed after conviction, and rarely before, I shall refer the whole business of clergy to a distinct examination, after I have done with the conviction of the prisoner.

2. Pleas in abatement of the indictment.

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, *viz.* *Not guilty.*

Now as to pleas in abatement of the indictment, they are of these kinds.

I. Such defects as arise upon the indictment itself, and the insufficiency of it, which hath been at large considered in the 24th chapter; if any such exception be taken by the prisoner, he may pray counsel to be assigned to him to manage his exceptions and take more; but he shall not have a copy of the indictment (*a*) from the court, but he and the counsel assigned may have *oyer* of the indictment, and press their exceptions upon it.

But it is rare to take any exceptions to indictments before conviction, unless upon indictments removed into the king's [237] bench by *certiorari*, which the court may in discretion hear or not hear, but remand the prisoner and the indictment.

And the reasons, why they are not taken in the country before conviction are, 1. Because he may have the same advantage of the

(*a*) But now by 7 *H. 3. cap.* 3. in all the prisoner shall have a copy of the indictment, in cases of treason, which work corruption of blood, or of maiming of such treason.

exceptions after the trial and before judgment, as before trial. (*) And 2. Because if the exceptions appear material, the court can quash that indictment, and direct a new bill to be sent out to the grand jury, wherein these faults may be amended, and the prisoner arraigned *de novo*.

II. Such defects as are in matters of fact, as *misnosmer*, or false addition of the prisoner.

As to the plea of *misnosmer*: In appeals or actions between party and party, or in indictments, if the defendant plead *misnosmer*, he must be careful that he conclude not himself by the manner of his pleading.

Therefore, when *Alan Gerard* was committed upon a *capias* in felony, the pleading was *Et statim ductus ad barram in propria personâ, Et quæsitus quomodo se velit inde acquietare statim dicit, quod ipse habet nomen Johannis Allen, Et non Alani Gerard, and pleads over to the felony not guilty, and the king's attorney replied, that tempore indictmenti prædicti fuit Et adhuc est cognitus tam per nomen Alani Gerard, quam per nomen Johannis Allen, Et quod culpabilis est de felon' &c. Et hoc petit quod inquiratur per patriam, &c. ideo venit inde jurata, Et prædictus Alanus Gerard per nomen Johannis Allen traditur in ballium: Vide 6 H. 7. 7. a.*

In an appeal or other action at the suit of the party *misnosmer* is a good plea.

[238] If the defendant in an appeal or indictment plead *misnosmer* of his surname, the plaintiff or king may aver, *que conus per un nosme Et l'autre. 1 H. 7. 29. a.*

But in an appeal or action at the suit of the party, if *misnosmer* be pleaded of the christian name, the plaintiff must take issue, and cannot plead *conus per l'un nosme Et l'autre. 1 H. 7. 29. a. 21 E. 3. 47. b.*

In an indictment of felony if the prisoner plead *misnosmer* of his christian name, some books hold it a good plea. 11 H. 4. 41. b. *Misnosmer* 18. *Stamf. P. C. Lib. 3. cap. 18. fol. 181. b.* but other books of greater and later authority be to the contrary. 1 H. 5. 5. b.

(*) But now by 7 W. cap. 3. no indictment for high treason, whereby any corruption of blood may be made, or for misprision of such treason, nor any process or return thereupon shall be quashed for mis-writing, mis-spelling, false or improper Latin, unless exception be taken in

court before any evidence given upon such indictment, nor shall any such mis-writing, &c. be any cause to arrest judgment after conviction, but such judgment may nevertheless be reversed upon writ of error, as if this act had never been made.

Misnomer 9. *Coron.* 274. 3 *H.* 6. 26. a. (b), *B. Misnomer* 6. per *Rolf*.

It seems by the case of *Gerard* before cited, which was a record of 2 plea in the time of *E.* 4. tho the defendant may plead *misnomer* of his christian name, yet the king may aver *conus per l'un nomme & l'autre*, tho it be otherwise in an appeal, but in all cases of pleading *misnomer*, he must plead over to the felony: *Vide Dy.* 88. a. b. 21 *E.* 4. 71. a. b.

But, as hath been before said, there is little advantage comes by these pleas to the prisoner upon these reasons; 1. Because, if this exception be taken in the country at the gaol-delivery, the count may allow the exception, and direct a new bill according to what the prisoner says his true name or addition is, for, as hath been said, whosoever pleads *misnomer* or a false addition must give himself the true name and true addition by his plea, and *that* will be conclusive to him.

2. Because this plea of *misnomer* or untrue addition shall be always tried by the same inquest, that is to pass upon the prisoner, and is ready at the bar, and at common law should never be sent to be tried in a foreign county. 34 *H.* 6. 50. a. 1 *E.* 4. 3. a. tho the book of 5 *E.* 4. 2. a. as to the addition of place be contrary.

But however in all cases of indictments of felony, tho the plea in itself were a foreign plea, and triable in another [239] county, yet by the statute of 22 *H.* 8. cap. 14. (continued by 28 *H.* 8. cap. 1. made perpetual by the statute of 32 *H.* 8. cap. 3.) all foreign pleas shall be tried by a jury of the same county where the party is indicted, but *that* statute extends not to treason, nor to an appeal of felony, but 32 *H.* 8. cap. 2. extends to appeals of felony, but not to an indictment of treason, so that foreign pleas in case of indictments of treason stand as they did at common law. *Co. P. C.* p. 27.

And *note*, that regularly in all pleas, whether to the writ, or in bar by matter of record, or by matter of fact, or both, if the plea do not confess the felony, as the plea of a pardon in case of an indictment, or a release in case of an appeal, tho his plea be found against him by issue tried, or adjudged against him by the court, yet he shall not

(b) The case in 1 *H.* 5. 5. b. was a misnomer of the surname, and in the abridgement of that case, by *Fitzh.* *Coron.* 274. there is a *quære* added, *quære si sit en nomme de baptisme*, and in 3 *H.* 6. 26. a. it was

not the point of the case, but only said *obiter arguendo*; and *Gerard's* case is to the contrary. See also *Layr's* case, *Sene Tr. Fel.* VI. p. 237.

be convicted thereupon, but plead over to the felony *not guilty*, as well upon an indictment, as upon an appeal, and this *in favorem vitæ*, 22 E. 4. 39. *per cur'*. 9 H. 4. 1. b.

III. A third sort of pleas in abatement by matter *dehors* is matter of record.

If *A.* be indicted of the murder of *B.* and there is another indictment afterwards taken of the same death against the same person, and he is arraigned upon the second indictment, because it is the king's suit the second shall not abate; yet usually the justices quash the other by judgment.

Yet *nota* the common course to prefer a new indictment of murder to the grand jury, altho an inquisition of murder be returned by the coroner, and if the coroner's inquisition be insufficient indeed, it shall be quashed, but if sufficient, it is usual to arraign the prisoner upon both indictments, and an acquittal upon one shall be upon both; and this is done, because otherwise the coroner's inquest will stand as a charge on record against the prisoner, tho acquitted upon the indictment, and process of outlawry will issue thereupon.

So it is the constant use at this day to prefer two indictments upon [240] the same killing against the same person, one of murder, and the other of manslaughter upon the statute of 1 Jac. for stabbing, and the prisoner arraigned upon both pleads to both, and the jury charged with both, *viz.* that if they find him guilty of both indictments, to return it so, if not guilty of murder, yet to inquire whether guilty upon the other indictment.

If a duke, or an earl, or baron be indicted by a common name of *J. S. miles*, or *J. S. armiger*, he may plead the *misnomer* to the indictment, *viz.* that he is a duke, or an earl, or baron, or peer of the realm, *nient nosme*, &c. because that title is part of his name, and intitles him to be tried by his peers; but then he must shew forth a writ testifying it upon his plea pleaded, because it is but dilatory, and shall not be tried by the country, but by the record 35 H. 6. 46. a. *per Fortescue*. 6 Co. Rep. 53. a. countess of Rutland's case, *Per curiam*.

And thus far touching dilatory pleas.

See Index to 2 Hawk. P. C. Tit. Abatement.

C H A P. XXXI.

Concerning pleas in bar of an indictment of felony or treason, and first, of auterfoits acquit.

PLEAS in bar of the indictment of felony or treason are of two kinds, *viz.* 1. Such as are purely matters of record, or 2. Such as are mixt, partly consisting of matters of record, partly of matters of fact.

Of the former sort are the pleas of pardons, either general by act of parliament, or special by the king's charter.

But because the business of pardons is not only a large title and full of variety, but is also applicable to all offenses criminal, whether the party be indicted or not indicted, or whether con- [241] victed, or attainted, outlawd, or put in *exigent*, I shall reserve the discussion of pardons towards the end of this book.

Of the latter sort are many pleas consisting of matters of record and also matters of fact. And they are of these sorts principally.

1. *Auterfoits acquit* of the same felony.
2. *Auterfoits attain* or *convict* of the same felony.
3. *Auterfoits attain* of another felony.
4. *Auterfoits convict* of another felony and had his clergy.

Now as to the plea of *auterfoits acquit*, (as also *auterfoits attain de mesme felony ou treason*,) it consists of two kinds of matters. 1. Matter of record, namely, the former indictment and acquittal, and before what justices, and in what manner, *viz.* by verdict or otherwise; and 2. Matter of fact, namely, that the prisoner is the same person that was acquitted, that the fact is the same of which he was acquitted, and whereof he is now indicted. This plea, tho the prisoner ministrcth rudely, yet counsel shall be assigned to him to put his plea in due form, because it is a special plea.

Mr. *Stamford* tells us, that the prisoner need not have the record of his acquittal *in poigne*, because the plea is not dilatory, but in bar, (and so in the other case of *auterfoits attain*, as it seems,) according to the difference taken by *Frowick*. 21 H. 7. 9. a.

But if that should be law, it were in the power of every prisoner to delay his trial as he pleaseth, by pleading *auterfoits acquit* or *attain* in
another

another court, and so to put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, and to remove it by *certiorari* into the king's bench, if the trial be there, or the tenor of it by *certiorari* into chancery, and by *mittinus* into the court where the trial is.

For regularly, if a record be pleaded in bar, or declared upon in the same court, the other party shall not plead *nul tiel record*, but have [242] *oyer* of the record; but if it be in another court, he shall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof. 5 H. 7. 24. a. b.

But it seems, that for the avoiding of false pleas and surmises and to bring offenders to speedy trial in capital causes the prisoner must shew the record of his acquittal, or vouch it in the same court one of these ways.

1. By removing the tenor of the record of his acquittal into chancery by *certiorari*, and having it in *poigne*, or sent to the justices by *mittimus sub pede sigilli* and thus the prisoner pleading *auterfoits acquit* shewed the record of his acquittal *sub pede sigilli* 2 E. 3. 26 b. Coron. 150.

2. Or else if he be arraigned in the king's bench upon an indictment removed, or found before them, and were formerly acquitted of the same felony, either before justices of peace or gaol-delivery, the court will give him a writ of *certiorari* to remove the record before them, and respite his plea till he can remove his acquittal into the court, that so he may form his plea upon it, for the record is part of his plea, and thus it was done. 20 E. 2. Coron. 232. and thereupon his plea is put into form setting out the record in certain, *Et hoc vocat recordum acquietancie prædictæ coram ipso rege hic ad mandatum domini regis missum & coram ipso rege remanens*; and thus it is pleaded in 2 E. 4. in Hodson's case, who was arraigned in the king's bench for murder, and pleaded an acquittal before the justices of peace in *Lincolnshire*.

But it is to be observed, that the record must be removed by writ; for altho the king's bench may take an indictment or other record of the justices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take a record of an acquittal to serve the prisoner's plea without writ. 8 E. 4. 18. b. 3 E. 3. B. Coron. 218.

If a man pleads *auterfoits acquit de mesme felonie*, and vouch the record, the court may examine proof, that it is the same felony, and thereupon allow it without any solemn confession by the king's attorney, 26 Affiz. 15. But the safest way is the confession of the king's attorney,

or

or an inquest charged to inquire, whether it be the same fact, *Vide R. Entries* 385. a. his plea allowed by the testimony of the justices of peace before whom he was acquit, *ideo consideratum est quòd prædictus B. de feloniam prædictam sit quietus & eat inde sine die.*

3. If the prisoner be indicted and arraigned in the country before justices of gaol-delivery, &c. and the prisoner pleads *autrefois acquit* of the same felony before the same justices in that county, or other justices of the same county, that were before them, then he concludes his plea, *Et hoc vocat recordum acquietancie, prædictie coram præfatis justiciariis* at such a gaol-delivery; and if it be in the king's bench, he mentions the term and roll, and thus is the plea in 13 *B. 4. Clud's* case in the king's bench.

So that the prisoner, tho he doth not shew the record *sub pede sigilli*, yet he must plead it certain, and have the record in court and remove it thither, if it be not in the same court, and not expect till *nul tiel record* be pleaded, for it is part of the prisoner's plea, tho the court may favour him with time to procure the removal of the record.

Now the matter of fact of his plea consists in his averment, that he is the same person. and that the felony, whereof he was acquitted, is the same whereof he is indicted, which is issuable, and the king's attorney may take issue upon it, or confess it if it be true, and then thereupon judgment shall be entered, *quòd eat sine die*, or the court may examine proofs and allow it. 26 *Asiz.* 15.

But it is to be known, that there must not only be an acquittal by verdict, but a judgment thereupon, *quòd eat sine die*, for the bare verdict of his former acquittal is not a sufficient bar without a judgment pleaded also, tho the acquittal regularly is a warrant for entry of the judgment at any time after.

And note also, that a formal acquittal by judgment is not only a bar of a new indictment for the same offence, but if the party be outlawd upon that new indictment, he may assign his former acquittal for error in that outlawry, and reverse it for that cause, and in that case the judgment is not only for the reversal of the outlawry, but also farther, *quòd ipse tam de indictmento de morte & murdro prædicti &c. quàm de utlegaria prædicta eat sine die*, and such is [244] the judgment in *Clud's* case 14 *E. 4.* where that error is assigned to reverse the outlawry.

Now for the full declaration of this plea these things are considerable. 1. What shall be said the same felony whereof the party was acquitted.

acquitted. 2. What manner of acquittal there must be to make it a bar. 3. In what suits *auterfoits acquit* is a plea.

I. As to the first of these.

If *A.* and *B.* be indicted as principals in robbing or killing of *D.* and *B.* be convicted as principal, and *A.* be acquitted, if after this *A.* be indicted, as accessary after the fact, this formal acquittal as principal, is no bar, for it is another offense, 27 *Affiz.* 10. *Coron.* 200. 8 *H.* 5. 6. *b. Coron.* 463. *Stamf. P. C. fol.* 105. *a.*

But if *A.* be indicted as accessary before the fact, he may (as it is held,) plead *auterfoits acquit* as principal, because it is in effect the same offense. 2 *E.* 3. 26. *b. Coron.* 150. 282. but antiently the law was otherwise. 8 *E.* 2. *Coron.* 424. *Itinere Kant'.*

If *A.* be indicted in the county of *B.* for the murder of *C.* and it be supposed that the murder was committed 1 *Martii* 17 *Car.* and he be acquitted. and after indicted again in the same county, supposing the murder 21 *Car.* yet notwithstanding that variance he may plead *auterfoits acquit*, and aver it to be the same felony, for the day is not material, and besides the death is of a person certain, who can be but once killed. 3 *Affiz.* 15. 25. *E.* 3. *Coron.* 136. 22 *Affiz.* 55.

And the same law seems to be in an indictment of robbery, tho it is possible several robberies may be committed at several days, for still it lies in averment, that it is the same notwithstanding the variance.

If a man be indicted for the robbery or murder of *John a Stiles* and acquitted, and after indicted for the robbery or murder of *John a Nokes*, yet he may plead *auterfoits acquit*, and aver it to be the same person notwithstanding the variance in the surname, for a man may [245] have divers surnames, and he may aver, *que conus per l'un nomme & l'autre.* 26 *Affiz.* 15. *Coron.* 189. 11 *H.* 4. 41. *a.*

If *A.* be indicted in the county of *B.* for a robbery or other felony supposed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the same person in the county of *B.* but at another vill, yet he shall plead *auterfoits acquit* notwithstanding the variance of the vill, and may aver it to be the same; but if he be afterwards indicted in the county of *C.* for a robbery supposed to be committed in the same county of *C.* (as it must be,) he shall never plead *auterfoits acquit* of the same robbery in the county of *B.* for the justices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the same, but it is said, that it is otherwise in an appeal. 4 *H.* 7. 5. *b.*

And

And therefore the book of 41 *Affiz.* 9. where an acquittal pleaded in a foreign county was allowd, must be intended of an indictment removed out of that county, where he was first indicted and acquitted.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D.* tho he cannot be indicted of robbery in the county of *D.* yet he may be indicted of larciny in the county of *D.* because the goods were carried thither; but suppose he be acquitted of larciny in the county of *D.* yet that acquittal is no bar to an indictment of robbery in the county of *C.* because it is another offense.

Nay it seems, it is no bar to an indictment of larciny in the county of *C.* for tho he be acquitted in *D.* it may be because the goods were never brought into that county, and so the felony in *C.* may not be in question, neither can the grand inquest or petit jury in the county of *D.* take notice of any felony committed in the county of *C.* and so the felony in *C.* is a distinct felony from *that* contained in the indictment in *D.*

If *A.* commit a burglary in the county of *B.* and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal.

And *à converso*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are several [246] offenses, tho committed at the same time. And burglary may be where there is no larciny, and larciny may be where there is no burglary.

Thus it hath happened, that a man acquitted for stealing the horse, hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time.

But if a man be acquit generally upon an indictment of murder, *autrefois acquit* is a good plea to an indictment of manslaughter of the same person, or *à converso*, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same. 4 *Co. Rep.* 46. *b.* *Holcroft's case per cur'*, and upon the same reason *autrefois acquit* upon an indictment of murder is a good bar to an indictment of petit treason, and *à converso*.

II. As to the second, what manner of acquittal is a good plea.

It must be an acquittal upon trial either by verdict or battle.

And

And therefore, if *A.* be accused and committed for felony, but no bill preferred, or *ignoramus* found, so that at the end of the sessions he is quit by proclamation, and delivered, yet he may be afterwards indicted. for he is not *legitimo modo acquietatus*.

If *A.* be assaulted upon the highway, or in his house by thieves or burglars to rob him, and he kill one of the thieves, which is no felony in law, and this matter be specially found by the coroner's inquest or grand inquest, whereupon he is discharged, yet he may be indicted *de novo* seven years afterwards for murder or manslaughter, and cannot plead the acquittal by the grand inquest.

But if he had been indicted generally of murder or manslaughter, and pleaded to it *not guilty*, and this special matter had been found by the petit jury, and thereupon judgment given, *quod eat sine die*, if he be afterwards indicted for the same fact, he may plead *auterfoits acquit*. *Crompt. fol. 28. a. Bull's case 26 Eliz.*

[247] Therefore it is no prudence to have the matter in any case found specially by the grand inquest or coroner's inquest, tho the fact being truly found by them amounts not to felony, as in the case before; and so *per infortunium*, or *se defendendo*.

If *A.* be indicted for felony, and be erroneously acquit by the mistaken direction of the judge, as, for that the felony was not committed the day mentiond in the indictment, yet that mistake lies not in averment, but to another indictment setting the day right he may plead *auterfoits acquit*. *2 Co. Instit. 318.*

If *A.* be indicted of murder or other felony, and plead *non culp.* and a special verdict found, and the court do erroneously adjudge it to be no felony, yet as long as *that* judgment stands unreversd by writ of error, if the prisoner be indicted *de novo*, he may plead *auterfoits acquit* and shall be discharged. *vide 9 H. 5. 2. b.* for it is the king's own suit, and tho the error appear, and regularly the judgment against the king is *salvo jure regis*, yet it is otherwise in case of life.

But if the judgment be reversd the party may be indicted *de novo*; *quære*, whether in that case upon the reversal upon the point of the verdict the party shall not be executed, for the judge *a que* should have given that judgment, but it seems *in favorem vitæ* he shall be arraigned *de novo*, for possibly he hath other matter for his defense.

If at common law *A.* had committed murder, and had been arraigned within the year upon an indictment, and had been acquitted, tho this arraignment should not have been, yet it stands as a good acquittal

acquittal pleadable to another indictment or appeal: *vide* 8 H. 5. 6. b. *Coron.* 463. 16 E. 4. 11. a.

A. was indicted for the murder of B. by poisoning, and the indictment runs *quod* B. *fidem adhibens persuasioni dicti A. nesciens prædictum potum cum veneno fore intoxicatum recepit & bibit, per quod prædictus B. immeditatè post receptionem veneni prædicti obiit*; but it is not alleged, *quod venenum prædictum recepit & bibit*; upon this he was arraigned and acquitted, and had judgment, *quod eat sine die*. Afterwards he was indicted again for the same offense, and pleaded *auterfoits acquit*, and shewed the record in certain, and [248] pleaded over to the felony and murder *not guilty*.

It was resolved, 1. That the indictment was insufficient for this cause. 2. That in this case *auterfoits acquit* was no plea, because the indictment itself was insufficient, for it contained not any matter of felony. 3. And so he is not *legitimo modo acquietatus*, and so the difference is between this case and those above of an erroneous judgment, for here the foundation itself, namely the indictment contained no felony. 4. But if the error be only in the process in an appeal or indictment, and yet the prisoner appear and plead *not guilty* and be acquit, this acquittal is pleadable 19 E. 3. *Coron.* 444. 5. But if he had been attainted upon this insufficient indictment and judgment given, he should not have been *auterfoits arraigne* upon a new indictment for the same offense, unless the former judgment had been first reversed. 6. But *auterfoits convict* or *auterfoits acquit* by verdict, &c. is no plea, unless judgment be given upon the conviction or acquittal in any case, 4 Co. Rep. 44, 45. *Vauxe's case*.

And the true reason of this judgment is rightly given by my lord Coke, P. C. 214. because the judgment upon the acquittal is only, *quod eat sine die*, which may be upon the defect in the indictment, which the judges are bound to look into, and it shall be supposed, that it was given upon that defect, and not upon the verdict, for the judgment is the same in both, but the judgment upon a conviction is, *quod suspendatur*, which is all the judgment that can be given.

But in the case of the special verdict above, where an erroneous judgment of acquittal is given, yet it is conclusive to the king till the judgment be reversed by error, for the judgment could be only given upon the verdict, the indictment being sufficient, and so is the diversity.

And note generally, that where *auterfoits acquit* or *attaint* is pleaded, yet in *favorem vitæ* he shall plead over to the felony, and be tried for the same, tho his special plea be found or adjudged against him, *Vauxe's case, ubi supra, &c. & 22 E. 39. b.*

[249] III. The third general is where, and in what suits *auterfoits acquit* is a good plea.

If *A.* be appeal of murder of *P.* by *C.* as son and heir of *B.* and is acquitted, and in truth *C.* was not the heir, but *D.* and thereupon *D.* brings an appeal, this *auterfoits acquit* is no plea, because not brought by the right party. 21 *H. 6. 28. b.* neither is it a bar to the king, but he may be indicted notwithstanding that acquittal, or if *D.* be nonsuit in his new appeal, he may be arraigned upon that appeal at the king's suit. 21 *H. 5. 28. b.*

If an appeal of murder or robbery be brought by *A.* against *B.* and *B.* is thereupon acquit by verdict, regularly this is a good bar to an indictment preferred by the king for the same robbery or murder both at common law and at this day.

But an acquittal by battle upon an appeal is held to be no bar to an indictment for the same offense: *vide Stamf. P. C. Lib. II. cap. 36. p. 106. b. (*)*

And at common law, if *A.* had been arraigned upon an indictment for murder or robbery, tho within the year, if an appeal be after brought for the same crime *auterfoits acquit* upon the indictment had been a good bar to the appeal, 16 *E. 4. 11. a.*

And therefore the justices at common law would rarely arraign a prisoner upon an indictment, especially for murder within the year after the death in favour of the appeal. 22 *E. 4. Coron. 44.* unless the appellant had been an infant 32 *H. 6. Coron. 278 & 279.* or the evidence had been very pregnant. 21 *H. 6. 28. b.*

But now by the statute of 3 *H. 7. cap. 1.* in case of murder or manslaughter the justices shall proceed to arraign the prisoner upon an indictment, tho within the year; and if the principal or accessory
[250] be acquitted or attainted within the year and day, yet this shall be no bar to an appeal against them, as if there had

(*) The reason assigned for this by *Stamford* is, because trial by battle does not lie against the king, wherefore he shall not be bound by such trial, yet *Stamford* makes a *quære* of this, for *Bract. Lib. III. cap. 19. §. 8.* is exprels to the contrary, and

says, that if he be acquit by battle, he shall go quit not only against the appellants, but also from the suit of the king, *quia per hoc purgat innocentiam suam versus omnes, ac si se poneret super patriam, & patria omnino ipsam acquittaverit.*

been no such acquittal, and therefore tho upon the indictment the offenders be acquit within the year, the court ought not to discharge them, but at discretion to bail or commit them, till the year and day be past, *vide le statute*.

So that by this statute *auterfoits acquit* or *attaint* upon an indictment of murder or manslaughter is no bar of an appeal for the same death, tho on the other side *auterfoits acquit* or *attaint* upon an appeal stands still a good bar to an indictment for the same murder or manslaughter. *Stamf. P. C. ubi supra. 4 Co. Rep. 40. a. Darley's case.*

But *auterfoits convict* of murder or manslaughter, and had his clergy upon an indictment is a good bar to an appeal notwithstanding this statute, for indeed the statute itself hath this exception, *the benefit of clergy not being had, 4 Co. Rep. 45. b. Wigg's case*, and this, tho an appeal were depending, whereunto the prisoner had not pleaded at the time of his acquittal. *4 Co. Rep. 45. b. Holcroft's case.*

But the case of other appeals, as of robbery, rape, &c are not within this statute, and therefore *auterfoits acquit* upon an indictment within the year stands as at common law a good bar to an appeal of robbery, or any other offense other than murder or manslaughter.

And yet at this day the judges never forbear to proceed upon an indictment of robbery, rape, or other offense, altho within the year, and the reason is, because appeals of robbery especially are very rare, and of little use since the statute of 21 H. 8. cap. 11. gives restitution to the prosecutor upon an indictment, as effectually as upon an appeal.

Index to 2 Hawk. P. C. Tit. Bar.

C H A P. XXXII.

[251]

Concerning the plea of auterfoits attaint or convict of the same felony, or any other offence.

IF *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayed his clergy, this is no bar of a new indictment for the same offense, if the first were insufficient. *4 Co. Rep. 45. a. Vauxe's case*, and it seems, tho it were sufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowed him,

auterfoits convict and had his clergy is a good bar to an indictment, or an appeal for the same crime, and so remains at this day, notwithstanding the statute of 3 H. 7. cap. 1. 4 Co. Rep. 40. a. 45. b. *Wigg's case*.

And so it is tho he prays his clergy, and the court will advise upon it, tho the clergy be not actually allowd. (*) 4 Co. Rep. 46. a. *Holcroft's case*. Co. P. C. cap. 57.

Auterfoits attain de mesme felonie, tho upon an insufficient indictment, was at common law a bar to appeals, as well as indictments of the same offense. 4 Co. Rep. 45. a. *Vauxe's case*, and remains so still at this day in all cases but in appeals of death, which is altered by the statute of 3 H. 7. cap. 1.

If *A.* be attain of felony by outlawry, yet, if he reverse the outlawry, he shall be put to answer the same felony, and plead to the indictment, whereof he was outlawd; but if he reverse the outlawry for this error, because he was *auterfoits acquit* for the same felony, (which, as before is said, is assignable for error,) he shall be discharged of the indictment, for it stands as well a plea to the indictment, as an error in the outlawry.

[252] If *A.* be indicted of piracy and refusing to plead bath judgment of *peine forte & dure*, and by the general pardon piracies are excepted, but the judgment of *peine forte & dure* is pardoned by the general words of all contempts, *quære*, whether he may be arraigned for the same piracy, but by the better opinion he may be arraigned of any other piracy committed before that award, 14 Eliz. Dy. 308. a.

If *A.* be attain of treason or felony by outlawry, yet he shall not be *de novo* indicted or appeal'd for the same felony till the outlawry be reversed, for *auterfoits attain* of the same felony is a good plea. Co. P. C. 213.

Auterfoits attain de murder is a good plea to an indictment of petit treason.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithstanding his attainder be arraigned for treason committed before the felony for the advantage of the king, who is to have the escheat, but not for a treason committed after the felony. 1 H. 6. 5. b. *Stamf. P. C. Lib. II. cap. 37. fol. 107. b.* But

(*) See the case of *Armstrong and Lisle*, Kel. 103, 104.

in this my lord *Coke* differs from *Stamford*, and saith that for a treason committed *after* he shall be arraigned. *Co. P. C. p. 213. (a)*

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring several appeals, and he be attaint at the suit of *B.* yet he shall be put to answer to the appeals of *C.* and *D.* for the benefit of the restitution of their goods. *Stamf. ubi supra.*

And if there be an indictment and attainder at the prosecution of *B.* yet *quære*, whether after at the prosecution of *C.* he may not be put to answer an indictment at his prosecution to have benefit of restitution upon the statute of 21 *H. 8. cap. 11. Stamf. Lib. 3. cap. 10.*

It seems in that case there may be an inquest of office to inquire of the robbery of *C.* so as to intitle him to restitution without arraigning the party upon an indictment of *C.*

If *A.* commit several felonies and be attaint for one of those felonies, and the king pardon that attainder and the felony, [253] for which he was attaint, if he be after indicted or appeal'd for the same felony, he may plead his attainder, and it will be no good replication to say he was pardoned after.

But yet he may be indicted or appeal'd for the other felonies, and if he plead his former attainder, it is a good replication to say he was pardoned after, whereby he is now restored to be a person able to answer to those offenses. 6 *H. 4. 6. b. 10 H. 4. Coron. 227. vide contra Co. P. C. p. 213.*

And so if a person attaint commit a felony after, and be pardoned the first felony and attainder, yet he shall be put to answer the new felony. 6 *H. 4. 6. b.*

If *A.* commit several felonies and be convicted for one of them, but no judgment of death nor clergy given him, he may be indicted for all those former felonies. *Stamf. ubi supra.*

But if he had been convicted for any one felony and prayed his clergy, and read and been delivered to the ordinary, he should never be arraigned for any of those former felonies. And it seems by the better opinion, that if he had prayed his clergy, & *tradito ei libro legit ut clericus*, but no award of *traditur ordinario*, yet he should not be arraigned for any felony committed before his clergy allow'd, for it was

(a) The case in 1 *H. 6. 5. b.* was of a treason subsequent to the felony, and therefore rather makes against *Stamford* in favour of lord *Coke's* opinion.

the fault of the court, that they did not award *tradatur ordinario*.
4 *Eliz. Dy.* 211. *b.* *Co. P. C. cap.* 57.

And the reason is, because the statute of 25 *E. 3. cap.* 5. *pro clero* enacts, that he shall be arraigned of all his offenses together, and then deliverd to the ordinary, and therefore if once deliverd to the ordinary, all his capital offenses committed before are in effect discharged, and therefore at least before the prisoner departs from the bar after his clergy allowd, he must be indicted, or otherwise he is for ever discharged.

But for any felony committed after conviction and clergy allowd, he may be indicted and arraigned, but not if he stands attainted and unpardoned.

[254] But at this day that old law concerning the discharge of offenses by clergy allowd is alterd.

By the statute of 8 *Eliz. cap.* 4. it is enacted, " That if any person admitted to his clergy shall before such his admission have committed any offense, whereupon clergy is not allowable by the laws and statutes of this realm, and not being thereof indicted and acquitted, convicted or attainted, or pardoned shall and may be indicted or appeald for the same, and put to answer, as if no such admission to clergy had been.

And by the statute of 18 *Eliz. cap.* 7. delivery to the ordinary is taken away, and burning in the hand wholly substituted in lieu thereof, and that every person admitted to his clergy shall answer such felonies or offenses, as he should have done, if he had been deliverd to the ordinary and made his purgation.

So that now clergy doth discharge all offenses precedent within clergy, but not such other offenses, as are out of the benefit of clergy.

There remains one special kind of *antejoits acquit* of another person, than he that pleads it, which I shall mention and so conclude this chapter.

The accessory upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary escape of a prisoner for felony may plead the acquittal of the felon of the principal felony, and so may the rescuer arraigned upon an indictment for rescue of a felon, and that is the reason, that the gaoler and rescuer shall never be arraigned till the principal felon be tried and convicted, because if he be acquitted, the gaoler or rescuer cannot be guilty of felony.

If *A.* steal the goods of *B.* and break prison, *A.* may be arraigned or the felony of breaking prison before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the prison, *A.* may plead this acquittal, for hereby that felony is purged before his conviction, this was Mrs. *Samford's* case in *Kent* for stealing the goods of the earl of *Leicester*. (*) [255]

To conclude this whole matter of *autrefois acquit*, *convict* or *attaint* these things are to be observed. 1. The party that pleads the record must plead it specially setting forth the record. 2. He must either shew the record *sub pede sigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the same court must vouch the term, year and roll, for the record is part of his plea. 3. He must make averments, as the case shall require, as that he is the same person, that it is the same offense. 4. No issue shall be taken upon the plea of *nul tiel record*, because it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are issuable. 6. If issue be taken upon them they shall be tried by the jury, that is returned to try the prisoner by the statute of 22 *H.* 8. *cap.* 14. 7. He, that pleads these pleas, must also plead over *not guilty* to the felony, for if the pleas be adjudged against him, yet he shall be tried upon the *not guilty*.

See Index to 2 Hawk. P. C. Tit. Bat.

(*) *Vide supra*, Part I. p. 612.

CHAP. XXXIII.

Concerning pleas to the felony, viz. Not guilty.

REGULARLY, where a man pleads any plea to an indictment or appeal of felony that doth not confess the felony, he shall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waving of his special plea, nor makes his plea insufficient for doubleness. 22 *E.* 4. 39. *b.*

And therefore, if he pleads any matter of fact to the writ or indictment, or pleads *autrefois convict*, or *autrefois acquit* he shall [256]
plead

plead over to the felony; and altho he doth it not upon his plea, but his plea be found or tried against him, yet he shall not be thereby convict without pleading to the felony and trial thereupon. 22 E. 4. 39. b.

But if a man plead to the jurisdiction of the court, as if an indictment of rape be found before the sheriff in his *Turn* and delivered to the justices, because the sheriff hath no jurisdiction to take an indictment of rape, the prisoner may plead to it without answering to the felony, thus it was done, 22 E. 4. 22. b. which was one *Wheeler's* case; so if the justices of the peace should arraign one for treason.

Or if a man plead a plea, that confesseth the fact, as a release in an appeal, he shall not plead over to the felony. 22 E. 4. 39. b. 9 H. 4. 1. b.

But yet even in that case it seems to me, that he may, if he please, plead over to the felony *not guilty*, and accordingly it is held by *Markham*, 7 E. 4. 15. a. in case of a release.

If *A.* be indicted of felony and plead the king's pardon, for instance, if the indictment be of murder, and the party plead a pardon of felonies, or the like, he shall not need to plead over to the felony, because it suits not with his plea.

And yet, if the pardon upon a demurrer of the king's attorney, or upon advisement of the court be adjudged insufficient, the party shall not be thereupon convict, but shall be put to plead to the felony and be tried for it, and yet the pleading of the pardon is a kind of confession of the fact, but yet *in favorem vitæ* the party shall be put to answer the felony (*); and thus it was done in the case of *Rutaby*, (†) who was indicted for murder in *Durham*, and the indictment removed by *certiorari* into the king's bench, and there he pleaded the king's pardon of murder, which for some defects were adjudged insufficient to pardon him.

He was thereupon remanded, and the indictment remitted, and tried for the fact in *Durham*, and, as I have heard, acquitted. *Hill* 1653.

[257] And regularly in all cases of felony or treason, where a man pleads a special matter, tho he conclude his plea with *not guilty* to the felony, or doth not conclude it so, yet if his plea be tried or found, or ruled against him, he shall be put to his plea of *not*

(*) *Vide supra*, p. 239.

(†) *Vide supra*, Part I. p. 467, Part II. p. 212.

guilty and be tried for the felony, for tho a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading. *Stamf. P. C. Lib. II. cap. 34. fol. 98. b.*

And therefore the book of 14 E. 4. 7. a. that saith, if the appelee demurs, and it be judged against him, it is peremptory, and he shall be executed, must be understood *cum grano salis*; and therefore *Brook* in abridging it, *B. Peremptory* 86. makes doubt of it.

But the true difference seems to be this, if a person be indicted or appeal'd of felony and he will demur to the appeal or indictment and it be judged against him, he shall have judgment to be hanged, for it is a confession of the indictment, and indeed a wilful confession, for he may have all the advantages of exception to the insufficiency of the indictment or appeal by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer, and in case of his demurrer no judgment of *peine fort & dure* can be given, because the demurrer is a plea, and thus the book of 14 E. 4. 7. a. and 7 E. 4. 29. a. are to be understood, and accordingly 2 Co. *Instit.* 178. *super stat. Westm. 1. cap. 12.*

But if the prisoner pleads in bar, and concludes, as he ought to the felony, or plead a pardon, where he concludes not to the felony, and the attorney general demur, and he join in demurrer, and it be adjudged against the prisoner, yet he shall be put to answer the felony, for this demurrer is no confessing of the indictment, and it is all one, as if his plea were found against him by the jury, or by certificate of the bishop, which yet is not so peremptory (a) but he shall be after tried for the felony. *Stamf. P. C. Lib. II. cap. 34. fol. 98. b.*

If A. be indicted of murder and he hath the king's pardon of manslaughter, if he be arraigned upon the indictment for [258] murder, he must not plead generally *not guilty*, for then he waves his pardon, but he must confess the indictment as to manslaughter and plead thereunto the king's pardon, and as to the murder, *viz. interfection' ex malitia præcogitata* he is to plead *not guilty*, and if he be found guilty of murder, he shall have judgment, if acquit of the murder, then his plea shall be allow'd, and thus I directed it in Sir Thomas Pettus's case in *Norfolk* about 24 Car. 2. and it is pursuant to the direction of the statute of 13 R. 2. cap. 1. which requires, that before the pardon allow'd it shall be inquired by the country,

(a) See 14 E. 4. 7. a.

whether the party were slain of malice prepense, and if so, the pardon to be disallowd.

Now the plea to the felony consists of two parts, *viz.* 1. The issue of *not guilty*. whereunto the clerk joins issue *cul. prist.* 2. The putting himself upon the country, when the clerk demands how he will be tried.

If either of these fail, it is in law a standing mute, whereupon in case of felony he is put to his penance, and in case of treason he hath judgment, as upon a *nihil dicit*, and so is attainted. 14 E. 4. 7. a.

In case of an indictment of felony or treason there can be no justification made, as a man cannot plead, that what he did was *se defendendo*, or in his defense against a burglar or robber, tho it amount in truth to no felony.

And the reason is, because the indictment supposeth in treason, that the fact was done *proditorie & contra liganitiæ suæ debitum*, and in felony, that the fact was done *felonice*, which is the point of the indictment, and must be answered directly, but upon *not guilty* pleaded he shall have the advantage of all such defenses, as he can make to acquit himself of the felony or treason, and may give all his special defense in evidence, tho the matter of fact be proved upon him, and so it is the most advantageous plea for the prisoner.

If duress and compulsion from others will excuse him or his own necessary defense in safe-guard of his life, or any other matter, the [259] jury upon the general issue ought to take notice of it, and to find their verdict accordingly, as effectually, as if it were or could be specially pleaded.

And now we have brought the prisoner to his trial, wherein we shall now proceed. And these trials of prisoners are of two kinds, *viz.* by battle, or by the jury.

The former doth not concern indictments, for therein there is no trial by battle, but concerns only appeals and approvers, and I shall therefore defer the discussion of trials by battle, till I come to consider of appeals in the end of this book, and proceed to the business of trial by jury.

C H A P. XXXIV.

Touching the trial of offenders by jury, and first, the process.

AFTER the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is the trial of the offender.

And therein these things will be necessary to be considered. 1. The process, that brings in the jury to try the prisoner. 2. The return to be made of them, and of what nature and quality they ought to be. 3. What is to be done, if they appear not, or be challenged off. 4. Concerning the challenge of the king, or of the prisoner unto them, if they do appear. 5. The trial and allowance, or disallowance of the challenge. 6. The order of the swearing of the jury. 7. The evidence to be given to the jury, what, and how, and in what manner. 8. The demeanor of the jury before and at the time of the delivering of the verdict. 9. The verdict itself, how to be given and ordered by the jury and by the court. 10. What is to be done in case of miscarriage of the jury either in their verdict, or the circumstances that attend it. [260]

I. And first therefore I will consider what, and how process is to issue to bring in the jury.

And this will be various according to those courts or judicatories, wherein the prisoner is to be tried, *viz.* 1. In the king's bench. 2. Before commissioners of *oyer and terminer*. 3. Before justices of gaol-delivery. 4. Before justices of peace, for these are the usual tribunals, where matters of this nature are determined.

1. Therefore, as to the king's bench.

If the offence be committed in the county, where the king's bench sits, and the indictment be originally taken in the king's bench, and the prisoner arraigned there, the court may proceed *de die in diem* in the term-time, and there needs not fifteen days between the *teste* and return of the *venire fac'* to bring in the jury. 9 *Co. Rep.* 118. *b.* lord *Sanchar's* case.

And the same law is, if the offence be committed in the same county where the king's bench sits, and the indictment be taken before justices

justices of peace of the same county, and removed into the king's bench by *certiorari*, and the prisoner be there arraigned and plead.

But if the offence be committed, and the indictment taken in another county than where the king's bench sits, and it be removed into the king's bench by *certiorari*, and the prisoner be there arraigned and pleads, there must be fifteen days between the *teste* and return of the *venire fac'* or other process. Lord *Sanchar's* case. 9 *Co. Rep. ubi supra*.

The *venire fac'* as all other process of that court, issues in the king's name under the seal of the court and *teste* of the chief justice, and always ought to bear *teste* after the issue joined between the king and the prisoner.

2. As to the commission of *oyer* and *terminer*. Tho there goes out a general precept in the name of three or more of the commissioners, and under their seals fifteen days before their session directed to the sheriff to return twenty-four jurors to try the issue between the king

[261] and the prisoners to be arraigned, yet this is but preparatory, and to have a jury in readiness; for after the prisoners are arraigned and pleaded to the country a precept ought to issue to the sheriff in nature of a *venire facias*, which may bear *teste* the same day, that the prisoners plead, commanding the sheriff to return twenty-four, &c. to try the issue upon such a day, and this precept must be in the names and under the seals of the commissioners or three of them, whereof one of the *quorum*, 4 *Co. Instit. cap. 28. p. 164.* and not barely by an award upon the roll.

Or they may make their precept returnable the same day that the prisoner pleads, *viz. ad horam primam post meridiem*, &c. for justices of *oyer* and *terminer* may take their indictment, and arraign the prisoner and try him the same day, against the opinion of 22 *E. 4. Coron. 44.* as appears by the precedents cited 4 *Co. Instit. ubi supra*, and by common experience.

If they make their precept returnable any day after, as for instance the second day of the sessions, they must not only make an adjournment, but record the adjournment, or else it will be intended returnable after their sessions, for the sessions is intended only the first day and no longer, unless an adjournment be entred.

3. Justices of gaol-delivery, after the prisoner hath pleaded, may take his pannel from the sheriff without making any precept to him, 4 *H. 5. Enquest 65. 4 Co. Instit. cap. 30. p. 168.* the reason given is, because justices of gaol-delivery send out a general commandment to

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the sheriff before their session to return juries against they come, otherwise it is, where they have a special commission *per Hankf.*

But this is not the reason, for so it is done by justices of *oyer and terminer* and justices of peace, and yet they make special precepts of *venire fac'* *vide antea, cap. 4.*

4. Justices of peace, as to the point of their precepts of *venire fac'* agree with justices of *oyer and terminer*, for they are as to this purpose commissioners of *oyer and terminer*, and may indict, arraign and try the same day in cases of felony, as it is agreed 4 *Co. Inst. p.* [262] 164. and usual practice.

Now there be certain general observations touching the process against the jury.

1. In all cases, where the process is by writ or precept, as well the award, as the writ or precept ought to mention truly the *visne*, from whence the jury shall come, and where it is only by award without writ or precept, as in case of the justices of gaol-delivery, the award ought to mention the *visne*, from whence the jury shall come.

As if a murder be supposed to be at *D.* the *venire fac'* ought to return a jury *de vicineto de D.*

If the murder be alledged *apud civitatem Bristol*, the *venire fac'* is most properly *de Bristol*, and it is good, because a city, 7 *H. 4. 13. a. Enquest* 26. but if it be from a place not a city, it must be *de vicineto de D.*

But tho it be a city, yet the *venire fac' de vicineto civitatis Bristol* is good, tho it be also a county, as hath been often resolved against the opinion of *Stamford, Lib. III. cap. 4. fol. 154. b.*

If the stroke be laid at *B.* and the death at *C.* in the same county, the *venire fac'* must be *de vicineto B. & C.* because both make the felony.

But by the statute (*a*), where the stroke is in one county, and the death in another, the indictment shall be, where the death was, and the *visne* shall be from the place, where he is alledged to die, for necessity, because the process is not to go into the other county.

If a murder be laid in *quadam platea vocat' Kings-street in parochiâ Sanctæ Margaritæ apud civitatem Westm.* the *visne* shall be neither from *Kings-street*, because it is alledged to be only *platea* nor *de vicineto civitatis Westm.* but *de vicineto parochiæ Sanctæ Margaritæ*, because more certain. 6 *Co. Rep. 14. a. Arundel's case.*

(a) 2 & 3 *E. 6. cap. 24.*

But if a murder be laid *apud B. in parochiâ de C.* the *venire fac'* shall be *de vicineto de B.* because more certain, for it shall be intended [263] a vill or hamlet within a parish, and by common intendment a parish may contain many vills. 11 *Co. Rep.* 25. *b.* *Harper's* case.

But at this day by the statute of 22 *H. 8. cap. 2.* made perpetual by 32 *H. 8. cap. 3.* if a foreign plea be pleaded in case of an indictment of felony, it shall be tried by the jury, that should try the issue of *not guilty*, but in case of an indictment of treason, as I have before said, that statute takes not place, but it shall be tried by a jury of that place or county, where the foreign matter pleadeth ariseth.

2. As to the number of the jury the *venire fac'* or precept is only *venire fac'* twelve, but the sheriff ought to return twenty-four.

But the general precept, that issues before a sessions of gaol-delivery, *oyer and terminer*, and of the peace before mentioned is to return twenty-four, and commonly the sheriff returns upon that precept forty-eight.

But the award or precept to try the prisoner after he hath pleaded is only *venire fac'* twelve, and twenty-four are returned by the sheriff upon that pannel.

3. Touching the manner of the precept, writ, or award.

If *A. B. C.* and *D.* be indicted for one felony or murder before any justices, they may issue one *venire fac'* or may issue several *venire fac'* or precepts, or awards of that kind.

If the *venire fac'* be joint, then if *A.* challenge twenty peremptorily, or challenge for cause, the jurors challenged shall be drawn against all, for each may have his several challenge, and the like, if it were in an appeal; so that, if there were eighty upon the pannel, they may be all challenged off by their several peremptory challenges, which is a great inconvenience, and therefore in such case they antiently used to sever the prisoners, and so put them to challenge apart, whereby they may possibly hit upon the same persons. 9 *E.* 4. 27. *b.* 21 *H.* 6. 22. *a.* 22 *H.* 6. 4. *a.* therefore the best way is to make out several *venire fac'* and consequently, if the pannel be challenged off, yet forty *tales* may be granted upon each *venire fac'*.

And if the *venire fac'* in an appeal be once granted jointly, it cannot be afterwards severed, neither can there be several *tales*, for [264] if the *venire fac'* be joint, the *tales* must be joint. 27 *H.* 6.

And it seems, that in case of an indictment, tho it be the king's suit, if once a *venire fac'* issue joint, there cannot issue a several *venire fac'* nor a several *tales*, which in many cases may much delay, if not frustrate the trial.

But before justices of gaol delivery, where there is no precept but only an award, tho at first the award be joint, and the pannel accordingly returned by the sheriff, and the prisoners challenge peremptorily severally, whereby there are not enough left upon the pannel to try them, and a *tales* is awarded returnable the next day, yet the court may sever the first award and also the *tales*. *Plow. Com.* 100. *a. b.* *Salisbury's case* adjudged.

It is therefore considerable, whether the difference between the cases of the old books and this be, that those were of an appeal, which is the party's suit, and this of an indictment, which is the king's suit, or rather, (as I think,) because this was in case of justices of gaol-delivery, where there is neither writ nor precept, but a command *ore tenus*, and when the record is made up, then an award upon the roll, which the justices may model, as they please, at any time before the trial, and requires not such strict formality as a writ. 4 *H.* 5. *Enquest* 55.

II. The second general is touching the return of the sheriff upon the precept, and the quality of the jurors.

Upon the writ or precept, or command to the sheriff he ought to make the return, whether the place or *visne* be within a franchise or not, and cannot return a *mandavi ballivo*, as in some cases of appeals, for here the writ is for the king, and therefore with a *non omittas propter aliquam libertatem*.

The writ commands him to return *duodecim liberos & legales homines de vicineto*; they must be, 1. Freemen and regularly freeholders. 2. *Legales*, without any just exception. And 3. They are to be *de vicineto*, but this is not necessarily required, for they of one side of the county are by law *de vicineto* to try an offense of the other side of the county.

But concerning the quality of the jurors more shall be said, [265] when we come to consider of challenges.

The jurors returned by the sheriff were, at common law, those, that were to try the prisoners, but by the statute of 3 *H.* 8. *cap.* 12. all pannels returned by sheriffs or their ministers, (which be not between party and party,) before any justices of gaol delivery, or of the

peace, whereof one of the *quorum*, shall be reformed by putting to, and taking out the names of the persons impannelled, by discretion of the justices, before whom such pannel shall be returned, and the pannels so reformed shall be good and lawful, and the sheriff shall return the pannel so reformed upon pain of 20*l*.

This statute, which began to be set on foot 11 *H. 7. cap. 24.* hath much reformed many practices of sheriffs in packing of juries in cases capital.

Note, tho the preamble of this statute mentions inquests of inquiry, the body of the act seems to extend to all pannels, as well of the petit jury, as of the grand inquest, and so it hath been constantly practised, for if a prisoner be arraigned before the judge that sits upon the crown-side, it hath been always usual for the judge to send for a jury to the judge of *nisi prius*, and when the jury is brought, the sheriff returns them between the king and the prisoner, which is by virtue of this statute.

Where the jury must be *de medietate linguæ*, and other matters relating to the quality of the jurors will be considered, when we come to consider of challenges.

III. The third general is to consider what is to be done, if the jury appear not, or be so challenged off, that there are not enough upon the pannel to try the prisoner.

If the process be in the king's bench, and the jury fill not, or be challenged off, that there are not enough to try the prisoner, there ought to issue a *disfringas juratores*, and a command to return *tales*.

But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *disfringas juratores* shall issue. and no *tales*.

[266] But if some of the jury appear, but not a full jury, or if so many of them, that appear, are challenged off, that there remains not a full jury, a *disfringas* shall issue with a *tales*.

If a full jury appear, and before they are sworn one of them die, so that there remains not a full jury, a *tales* shall be granted, and so it is, if one jurymen dies after he be returned and sworn. 12 *H. 4. 10. a.* 20 *E. 4. 11. b.*

If a *tale* issue, and they do not appear full, or be challenged off, so that those that appear upon the principal pannel and *tales* make not up a full jury, another *tales* may be granted. 14 *H. 7. 1. b.*

In

In case of felony a *tales* may be granted of a greater number than the principal pannel in respect of challenges, so that there may be forty *tales* or more. 14 H. 7. 7. but if several succeeding *tales* be granted, the latter must be less in number than *that* which was next before, unless the array of the preceding *tales* be quashed, and then the number of the next may equal it. 20 H. 6. 40. a.

The times between the *teste* and return of the *tales* must be (as it seems,) as in the principal *venire fac'*, viz. if the indictment be in a foreign county and removed into the king's bench, fifteen days, if in the same county, *de die in diem*.

If the indictment be before justices of *oyer and terminer*, the *tales*, as well as the principal pannel, ought to be by precept in the names of three of the justices, and may be made returnable *de die in diem*, or *de hora in horam* of the same day.

And as to all other matters they resemble the proceedings in the king's bench, viz. the number, the manner, and times of granting it, and so need not be repeated.

Before justices of gaol-delivery this learning of *tales* is not of much use, because there is no particular precept to the sheriff to return either jury or *tales*, but the general precept before the sessions and the award, or command of the court upon the plea of the prisoner. 4 H. 5. *Enquest* 55. *Stamf. P. C. Lib. III. cap. 6. fol. 155. b.*

And yet, *vide Plow. Com. 100. a.* in *Salisbury's* case before justices of peace and gaol-delivery, a *tales* granted returnable the next day. [267]

See 4 Blacks. Com. ch. 27. of Trial, &c. Index to 2 Hawk. P. C. Tit. Trial. See 2. Hawk. P. Coron. ch. XL. XLI. XLII.

C H A P. XXXV.

Concerning challenges, and first, of peremptory challenges.

CHALLENGES in respect of the parties taking them are of two kinds. 1. Challenges by the prisoner. 2. Challenges by the king.

Challenges by the prisoner are of two kinds. 1. Without cause shewn, which are commonly called peremptory challenges. 2. With cause

cause shewn, which again are of two sorts. 1. Of the array: 2. To the poll.

In this chapter I shall consider peremptory challenges what they are, and what is to be done upon them.

By the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he should not challenge peremptorily or without cause. *Stamf. P. C. Lib. II. cap. 7. fol. 158. a.*

The like law seems to be, if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

But if a man be indicted or appealed of treason or felony, and plead *not guilty*, or plead any other matter of fact triable by the same jury, and plead over to the felony, because his life is now at stake he might challenge peremptorily and without cause any jurors under the number [268] of three whole-juries, namely thirty-five of the jurors returned, and they are to be withdrawn out of the pannel; and this was *in favorem vitæ*, *Moore 12.*

And if twenty men were indicted for the same offense, tho by one indictment, yet every prisoner should be allowed his peremptory challenge of thirty-five persons. 9 E. 4. 27. b.

And if there were but one *venire fac'* awarded to try them, the persons challenged by any one should be withdrawn against them all. 9 E. 4. 27. *Plow. Com. 100. Salisbury's case.*

But if he had peremptorily challenged above thirty-five persons, and insisted upon it, and would not leave his challenge, then in case of an indictment of high treason, it amounted to *nihil dicit*, and judgment of death should be given against him.

But in case of petit treason or felony the prisoner was antiently put to *peine forte & dure*, as declining the trial by law appointed, the consequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and consequently no escheat of his lands; *vide 14 E. 4. 7. a. Plow. Com. 262. b.* and thus the practice was until the beginning of H. 7. *vide 17 Affiz. 6. 17 E. 3. 23. a.*

But afterwards by the advice of all the judges of both benches it was resolved, that the party so peremptorily challenging above thirty-five should have judgment of death, and it amounted to an attainder, 3 H. 7. 12. a. *Co. P. C. 227, 228*, for having pleaded to the felony, and put himself upon the country here could be no standing mute, and therefore

fore the judges resolved on this course, as most consonant to law, to be practised in all circuits. 3 *H.* 7. 12. *a.*

But for all this the better opinion of latter times, as well as of former is, that the judgment in case of such a peremptory challenge of above thirty five at the common law before 22 *H.* 8. in case of felony was not an attainder but only penance according to the resolution of the judges in the time of *E.* 4. mentiond by *Hussey* 3 *H.* 7. 12. *a.* *Stamf. P. C. Lib. II. cap. 61. fol. 150. b.* *Stamf. prærogat. 46. a.* *Plow. Com. 262. b. per Weston.*

And in this case the jury it seems was not to be sworn, but the judgment was given singly upon his peremptory challenge. [269]

And yet, if a prisoner plead *not guilty*, and put himself upon the country, and the prisoner challenge peremptorily under three juries, viz. thirty-five, whereby the jury remains, and a *tales* is granted, and the jury appears, and the prisoner then stands mute, yet the jury shall pass upon him upon his plea of *not guilty*, which he had before pleaded. 15 *E.* 4. 33. *b.*

But by the statute of 22 *H.* 8. *cap. 14.* it is enacted, "That no person arraigned for petit treason, murder, or felony be admitted to any peremptory challenge above the number of twenty, this act was continued until 32 *H.* 8. *cap. 3.* and then made perpetual.

By the statute of 33 *H.* 8. *cap. 23.* it is enacted, "That in cases of high treason, or misprision of treason, peremptory challenge shall not be allowd.

But notwithstanding these statutes, by the statute of 1 & 2 *P.* & *M.* *cap. 10.* enacting, "That all trials for any treason shall be according to the due order and course of the common law," peremptory challenge of thirty-five or under, is, at this day, allowable in cases of high treason and petit treason. *Co. P. C. 227.* *Stamf. P. C. Lib. 3. cap. 7. fol. 158. a.*

And consequently all the consequences thereof, namely the attainder of the prisoner, that peremptorily challengeth above thirty-five in an indictment of high treason or petit treason, stand as at common law.

But as to all murders and other felonies the statute of 22 *H.* 8. *cap. 14.* taking away the peremptory challenge of above twenty stands in force. *Co. P. C. 227, 228.*

But then suppose the prisoner in case of felony peremptorily challenges above twenty, what shall be done? shall judgment of death be given, as where he challenged above thirty-five at common law? And it should seem, by the opinion of former times, it should.

[270] For the several statutes, that oust clergy in case of challenging above twenty, import, that by such challenge the party should be convicted, otherwise clergy were needless to be ousted upon such challenge, as 25 *H. 8. cap. 3. vide 11 Co. Rep. Poulter's case* 30 *b. 4* & 5 *P. & M. cap. 4.*

But yet, if he challenge above twenty, as the law stands at this day, he shall not have judgment of death, but only his challenge shall be over-ruled, and the jurors sworn for two reasons. 1. Because the statute hath made no provision to attain the felon, if he challenge above the number of twenty. 2. Because the words of the statute of 22 *H. 8.* are, *That he be not admitted to challenge above the number of twenty*, so that, if he challenge above twenty peremptorily, his challenge shall be only disallowd. *Co. P. C. cap. 102. p. 227, 228.*

If *A.* be indicted and plead *not guilty*, the jury appears, he challengeth six of the jury for cause, and the causes found insufficient, and the six are sworn, and the rest of the jury challenged off, whereby the inquest remains *pro defectu juratorum*, a *tales* granted and the jury appear, the prisoner may challenge peremptorily any of the six, that were before challenged for cause, allowd, and sworn 32 *H. 6. 26. b. 14 H. 7. 19. a.* for it is possible a new cause of challenge may intervene after the former swearing. 2 *R. 3. 13. a.* but if a man challenge him for cause, he must shew a cause happened after the former swearing.

But if the prisoner upon the first pannel had challenged for instance fifteen peremptorily, and then the jury remains for default of jurors, and a *disfringas* with a forty *tales* is granted, he shall challenge peremptorily no more than will fill up his number, *viz.* in case of felony at this day five more, and in case of treason or petit treason twenty more to make up his full number of twenty peremptory challenges in the first case, and thirty-five in the last.

See 2 Hawk. P. C. ch. XLIII. of challenges. 4 Blackf. Com. ch. 27. pa. 352, &c. &c. Burn. Tit. Jurors, sect. iv. of the challenge of jurors. Index to Foster. Tit. challenge.

C H A P. XXXVI.

Concerning challenges for cause, in case of indictments for treason or felony.

CHALLENGES for cause upon indictments are of two kinds, either for the king, or for the prisoner, and each of these are again of two kinds, either to the array, or to the poll.

The king may challenge the array or the poll. 4 *H.* 7. 3. *b.* Stat. 33 *E.* 1. *Ordinatio de inquisitionibus*, but then he must shew cause of challenge, but he need not shew the cause upon his challenge to the poll, till the whole pannel be perused. *Stamf. P. C. Lib. III. cap. 7. fol. 162. b.*

Challenges by the prisoner for cause shewn are of two kinds, *viz.* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the sheriff or juror is of the king's livery, but he must conclude to the favour. 3 *H.* 6. *Challenge 17.*

If an alien be indicted or appealed of felony, tho the indictment ought to be by a grand inquest of *English*, yet by the statute of 28 *E.* 3. *cap. 13.* the trial shall be *per medietatem lingue*, *viz.* half the jury to be of aliens, except in case of felony by *Egyptians*, within the statute of 1 & 2 *P. & M. cap. 4.*

And this statute extends to felonies, as well made after the statute of 28 *E.* 3. as before, for the statute is general *all manner of inquests*.

And this statute extended to trial of aliens indicted of treason also, and so the law stood till 1 & 2 *P. & M. cap. 10.* which restored the common-law trial in treason, and consequently ousted *medietas lingue*. 1 *Mar. Dy.* 145. *a.* *Shirley's case. Co. P. C. p. 27.*

If upon an indictment of felony against an alien he plead *not guilty*, and a common jury be returned, if he doth not [272] surmise his being an alien before any of the jury sworn, he hath lost that advantage, *Dy.* 304. *a.* but if he alledge, that he is an alien, he may challenge the array for that cause, and thereupon a new precept or *venire facias* shall issue, or an award be made of a jury *de medietate lingue*. 21 *H.* 7. 32. *b.* but it is more proper for him to surmise it upon his plea pleaded, and thereupon to pray it.

It seems, that upon indictments of treason or felonies, the prisoner pleading *not guilty* there ought at common law to be four hundreders returned: *vide Stat. 33 H. 8. cap. 23.* that ousted challenge for shire or hundred in cases of treason, but that statute as to treason was altered by 1 & 2 P. & M. cap. 10.

But the statute of 35 H. 8. cap. 6. requiring six hundreders, and that of 27 Eliz. cap. 6. requiring only two hundreders in personal actions extend not to trials upon indictments of treason or felony.

Yet I never knew any challenge for default of hundreders upon a trial of an indictment for felony or treason.

Challenges to the poll for cause are many, as in other cases, which I shall not mention at large, because they are all gathered up by my lord Coke *super Lit.* §. 234. but shall only mention such, as more specially belong to capital causes.

By the statute of 33 H. 8. cap. 12. for treason or felony committed in the king's house and tried before the lord steward all challenge except for malice is taken away. By the statute of 25 E. 3. cap. 3. it is enacted, "That no indictor be put in inquest against the party" indicted, if he be challenged for that cause.

By the statute of 2 H. 5. cap. 3. no man is to be admitted in any inquest upon the trial of the death of a man (a), unless he have lands

(a) That is to say in capital causes: This statute was introductive of a new law only with respect to the *quantum* of the freehold, for by the *common law* it was requisite that a juror should be a freeholder, so that, tho this statute be repealed by the general words of 1 & 2 P. & M. cap. 10. as to treason, yet some freehold was still necessary, and so it was allowed in *Fitzharris's case* by *Pemberton C. J.* See *Stat. Tr. Vol. III. p. 263.* notwithstanding it was ruled otherwise in the case of lord *Rusell* by the same judge, *Stat. Tr. Vol. III. p. 634.* and in the case of *Col. Sydney.* *Ibid. p. 736.* which last resolutions were declared to be illegal by several acts of parliament. See 1 W. & M. *Stiff. 2. cap. 2. 7 W. 3. cap. 3.* See also *Sir John Hawles's* remarks on those trials. *Stat. Tr. Vol. IV. p. 169, & p. 189.* By 4 & 5 W. & M. cap. 24. continued by 10 Ann. cap. 14. & 9 Geo. 1. cap. 8. 'tis not sufficient, that a juror be a freeholder, but he must also have within the same county freehold or copyhold lands to the clear yearly value of ten pounds, and tho this statute seems principally to regard counties at large, yet it hath been allowed to extend to trials in

London for high treason. *Francis's case. Stat. Tr. Vol. VI. p. 38.* and *Lay's case Stat. Tr. Vol. VI. p. 245.* See the statutes of 3 Geo. 2. cap. 25. & 4 Geo. 2. cap. 7. made perpetual by 6 Geo. cap. 37. whereby it is provided, "That all leaseholders upon leases for the term of 500 years or more, or for 99 years, or any other term determinable upon one or more lives of an estate in possession in land in their own right of the yearly value of twenty pounds or upwards over and above the reserved rent payable thereout, (or in the county of *Middlesex* upon any leases, where the improved rents or value amount to fifty pounds or upwards *per annum* over and above all ground rents or other reservations, may be summoned or impanelled to serve on juries in like manner as freeholders, &c. And that the sheriffs of *London* shall not impanel or return any person to try any issue in *King's-bench, Common Pleas, and Exchequer*, or to serve on any jury at the sessions of *oyer and terminer*, *gaol-delivery*, or sessions of the peace, but such who shall be an householder within the said city, and have real or personal es-

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lands or tenements of the value of 40*s. per ann.* above all charges, if he be challenged: And by the construction of this statute, 1. It must be land of that value in the same county 9 *H.* 7. 1 *b.* Again 2. He must not only be seised thereof at the time of the pannel made, but also at the time that he comes to be sworn, otherwise he may be challenged. 12 *H.* 7. 4. *a.*

And altho the statute of 27 *Eliz.* cap. 6. hath raised it to 4*l. per annum*, yet that extends only to issues joined in the king's bench, common pleas, exchequer, and justices of assise, so that it reacheth not to trials of felons before justices of gaol-delivery, *oyer and terminer*, or of the peace, but these trials stand as they did by the statute of 2 *H.* 5. as to the value of jurors, *vide stat.* 33 *H.* 8. cap. 23.

But yet by some subsequent statutes the value of jurors freehold in cases of trial of felony is changed.

By the statute of 8 *H.* 6. cap. ultimo upon a trial *per medietatem linguæ* aliens need not have 40*s. per ann.* so defectus annui censûs is no challenge as to the aliens, but still it remains a good challenge as to the other half of the jury, that are denizens. *Stamf. P. C. fol.* 160. *b.*

By the statute of 23 *H.* 8. cap. 13. upon trials of felony or murder in cities or boroughs a citizen or burgher worth 40*l.* personal estate may pass, tho he have no freehold, but knights or esquires living there are not within this provision.

The statute of 33 *H.* 6. cap. 2. concerning indictments of persons living in *Lancashire* refers not to trials.

By the statute of 11 *H.* 6. cap. 1. a challenge is allowd of any person living in the stews of *Southwark*, tho he be of sufficient freehold.

When a prisoner challengeth for cause he ought to shew his cause presently (*b*) because it is the king's suit, 1 *H.* 5. 10. *b.* 38 *Affiz.* 22. (*c*) but some books are, that he shall not shew cause till the pannel be perused 6 *R.* 2. *Challenge* 105. but he must shew all his causes together *per* 24 *Eliz.* C. B. *Bracket's case*.

If in a trial upon an indictment of felony eleven be sworn, and the twelfth challenged, whereby the inquest remains for default of jurors,

“ate to the value of one hundred pounds,
“and that no person shall be impannelled
“or returned to serve on any jury for the
“trial of any capital offense, who shall
“not be qualified to serve as a juror in civil
“causes; and the same matter and cause
“alleged by way of challenge and so

“found shall be admitted as a principal
“challenge, and the person so challenged
“may be examined on oath as to the truth
“of the said matter.
(*b*) *M.* 846. *Luke and Clerk.*
(*c*) See *Challenge* 128.

and a *disfringas* with a *tales* issue, and the jurors appear, ruled 1. The king shall not challenge any of the eleven sworn, unless it be for a cause happened since their swearing; if it happen before, tho not known till after, it shall not be allowd. 2. That the eleven, that were last sworn, shall not be now first sworn, but they shall be called, as they happen in the pannel. *M. 43 & 44 Eliz. B. R. Wharton's case, Yelv. 23.*

And the same law is for the challenge of the prisoner for cause, but he may challenge them peremptorily notwithstanding they were formerly sworn, as before is shewn, *p. 270.*

Touching the trial of a challenge for cause made to the poll, *vide* [275] *Co. Lit. p. 158. a.* If a juror be challenged before any jury sworn, two triers shall be appointed by the court, and if he be found indifferent and sworn, he and the two triers shall try the next challenge, and if he be tried indifferent, then the two first triers shall be discharged, and the two jurors tried indifferent shall try the rest.

If the plaintiff challenge ten and the prisoner one, then he that remains shall have added to him one chosen by the plaintiff, and another by the prisoner, and they three shall try the challenge. If six be sworn, and the rest challenged the court may assign any two of the six sworn to try the challenges.

If the array be challenged, it lies in the discretion of the court how it shall be tried, sometimes it is done by two attornies, sometimes by the two coroners, and sometimes by two of the jury with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two assigned thereunto by the court. *29 Eliz. C. B. Lester's case, Trin. 21 Jac. B. R. Loyd and Williams (e).*

But all this learning touching challenges to the poll, whether peremptory or for cause, is intended of trials by ordinary juries, not of trial by peers, for there no challenges is allowable, for they are not only triers of the fact but in some respects judges. *P. 7 Car. 1. Casus comitis Castle-haven (f),* but of this more hereafter.

2 Hawk. P. C. ch. 43. 4 Blackf. Com. ch. 27. Burn. Tit. Jurors. Index to Foster. Tit. Challenge.

(e) 2 Rel. Rep. 363.

(f) Stat. Tr. Vol. I. p. 366.

C H A P. XXXVII.

Concerning evidence and witnesses.

HAVING gone through those things, that are previous and preparatory to the trial, I come now to consider the trial itself by jury, and the things concomitant with it, and first concerning the evidence to be given to prove the prisoner guilty.

To give a full account of evidence of this kind there will be these things examinable. 1. The quality and qualifications of witnesses. 2. The manner of their testimony, what upon oath, and what without oath. 3. Those evidences and examinations, that are in writing, what, and when allowable, and what not. 4. The things testified, and therein of presumptions and presumptive evidences by the common law, and by acts of parliament. 5. What variance between the evidence and indictment maintains the indictment.

1. Concerning the quality and competency of witnesses to be produced.

It is to be observed, that there be many circumstances that disable a juror or are sufficient causes of exceptions or challenges of him, that are not allowable exceptions against a witness.

The exception of kindred is a good cause of challenge against a juror, but not against a witness, therefore the father may be a competent witness for or against his son, or *à converso*, the master for his servant or *à converso*. These and the like exceptions may be to the credit or credibility of a witness, but are not exceptions against his competency.

For that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony, and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, [277] who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony, and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances. 2. Exceptions to the competency of the witness, which do exclude him from giving

his testimony, and of these exceptions the court is the judge, and of these latter kind of exceptions I am here to treat.

If a person be outlawd in a personal action, it is a good cause of challenge against him as a juror, but yet he shall be sworn as a witness notwithstanding his outlawry. *Coke super Lit.* §. 1. fol. 6. b.

The common incapacities or incompetencies of witnesses are reckoned up by my lord *Coke ubi supra*, viz. 1. If he be attaint of giving a false verdict. 2. Or attaint of a conspiracy at the king's suit, for then he is to have a villainous judgment and *amittere liberam legem*, otherwise it is if he be only attaint at the suit of the party: *vide* 24 E. 3. 73. b. 43 E. 3. 33. b. 4 H. 5. Judgment 220. 46 Affiz. 11. 27 Affiz. 59. 3. If he be convict of perjury. 4. Convict of a *præmunire*. 5. Convict of forgery upon the statute of 5 Eliz. cap. 14. but [not] a conviction upon the statute of 1 H. 5. cap. 3. 6. If he be convict of felony (*a*). And therefore it should seem, that an approver shall not be sworn as a witness, if the appellee plead to the country, but only his general oath, that he taketh at the time of his becoming an approver, shall be taken, *quod tamen quære*, for this case differs from the testimony of a person convict, for the approver accuseth himself as well as the appellee. 7. If by judgment he hath lost his ears. 8. Or by judgment stood upon the pillory. 9. Or tumbrel. *Co. P. C.* 219. for they are thereby infamous. 10. Or been branded, *stigmaticus*. 11. Or being a champion in a writ [278] of right becomes recreant or coward, for these render a person infamous, so that he loseth *liberam legem*.

But yet in these exceptions these things are to be observed. 1. That he that allegeth this exception ought to shew forth a copy of the record attested or vouch the roll in court. 2. That if the king pardon these offenders, they are thereby rendered competent witnesses, tho their credit is to be still left to the jury, for the king's pardon takes away *pœnam & culpam in foro humano*, *M. 12 Jac. B. R. Cuddington & Wilkins (b)*: but yet it makes not the man always an honest man, and therefore he shall not be a jurymen 11 H. 4. 41. but yet may be a witness against the opinion of my lord *Coke* in *Crashaw's* case, *M. 11 Jac. B. R. Bulstrode* 154. *quod vide*.

If a man be convict of felony, and prays his clergy, and is burnt in the hand, he is now a competent witness, for by the statute of

(a) See *Dargerfield's* case in the trial of Lord Castlemain, *Stat. Tr. Vol. III. p. 42.* *Raym.* 379. and the trial of *Enz. Cellier*, *Stat. Tr. Vol. III. p. 35.* *Raym.* 369. (b) *Heb.* 67 & 89.

18 *Eliz. cap. 7.* it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods. *Hob. 288. Searle and Williams.*

And so it is if he be in orders, whereby burning in the hand is discharged by the statute of 4 *H. 7. cap. 13.* *Hob. ubi supra.*

And so it is if the burning in the hand be pardoned, *Hob. ibid.* or if he prays his clergy, tho the court do respit his reading, *quare, vide Holcroft's case, 4 Co. Rep. 46. a.*

There are certain other matters, that render a man incompetent to be a witness, tho they are not such as render him infamous by judgment or award in any of the king's courts.

1. Some are disabled in regard of defect of intellectuals: A person of *non sane memory* cannot be a witness, while he is under that insanity, but if he have *lucida intervalla*, then during the time he hath understanding he may be a witness. *Co. Lit. ubi supra.* But it is a difficulty scarcely to be cleared, what is the *minimum, quod sic* disables the party.

If an infant be of the age of fourteen years, he is as to this purpose of the age of discretion to be sworn as a witness, but if under that age, yet if it appear that he hath a competent discretion, he may be sworn.

But in many cases an infant of tender years may be examined without oath, where the exigence of the case requires [279] it, as in case of rape, buggery, witchcraft, *de quibus vide quæ supra, Part I. cap. 24. p. 302. & cap. 58. p. 634. & infra, p. 283.*

2. It is said by my lord *Coke ubi supra*, that an infidel is not to be admitted as a witness, the consequence whereof would also be, that a *Jew*, (who only owns the old testament) could not be a witness.

But I take it, that altho the regular oath, as it is allowed by the laws of *England*, is *tactis sacrosanctis Dei evangelis*, which supposeth a man to be a christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by *Jewish* brokers, the testimony of a *Jew tacto libro legis Moisaicæ* is not to be rejected, and is used, as I have been informed, among all nations.

Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverit per verum Deum creatorem*, and special laws are instituted in *Spain* touching the
term

form of the oaths of infidels. *Vide Covarruviam, Tom. I. part 1. de juramenti forma (c).*

And it were a very hard case, if a murder committed here in *England* in presence only of a *Turk* or a *Jew*, that owns not the christian religion, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of *England*.

But then it must be agreed, that the credit of such a testimony must be left to the jury.

3. Some regularly are disabled in respect of the civil unity of their persons, as the husband regularly is not allowed to be a witness for or against the wife, or *à converso*; but *vide* touching this also at large *Part I. cap. 24. in fine & ibid. cap. 64. p. 693. super statut. 1. Jac. cap. 11.*

4. Some are disabled to be witnesses in respect, that they are concerned in interest.

[280] And therefore a party to an usurious contract, if the money be unpaid, shall not be received as a witness to prove the usury, because he avoids thereby his own security, but otherwise it is, if the money be already paid, and the security taken up, for then he is allowable to be a witness for the king (*d*).

A. wounds *B.* for which he is indicted, yet *B.* may be a witness for the king: but this shall be no evidence in an action brought by *B.* for the assault, tho *A.* be convict at the king's suit.

If a reward be promised to a person for giving his evidence before he gives it, this, if proved, disables his testimony.

And so for my own part I have always thought, that if a person have a promise of a pardon, if he gives evidence against one of his own confederates, this disables his testimony if it be proved upon him (*e*).

Yet in some cases a consequential benefit to the witness doth not disable his testimony, tho it may abate the credit of his testimony.

A. B. and *C.* are severally indicted for perjury in proving a bond, *A.* traverseth the indictment, *B.* and *C.* tho indicted for the same

(c) P. 249. Edit. Antwerp. 1614.

(d) Co. Lit. 6. b.

(e) However the contrary opinion hath prevailed, see *Tang's case, Kel. 13.* and

Loyer's case Stat. Tr. Vol. 6. p. 257. but most certainly it is a great objection to the credibility, if not to the competency of the witness, *vide supra, Part I. p. 304.*

offense, yet not being convicted may be witnesses for *A.* to prove the bond sealed. *P. 19 Car. 1. B. R. Rot. 2.* adjudged in the case of *Billmore, Gray, and Harbin*, and accordingly ruled *P. 40 Eliz. C. B. Gunston and Downs (f)* in three actions severally brought against three persons for perjury in *Chancery* in one and the same point, for the other two are not immediately concerned in this trial, tho consequently they are concerned, the point being the same.

If *A.* bring an action upon the statute of *Winton* against the hundred, none that live or have land in the hundred shall be admitted to give evidence for the hundred. *M. 1650. Bennet versus Hundred de Hertford (g).*

Yet if a person be taken and indicted for the robbery, they of the hundred may be admitted to prove the defendant guilty of the robbery, and that he was taken upon their pursuit, tho this doth consequentially discharge the hundred upon the statute of *Winton*, & 27 *Eliz. cap. 13.* [281]

A. brings an action against *B.* wherein *C.* is produced as a witness for *A.* and *A.* recovers upon his testimony, *C.* is thereupon indicted of perjury *contra formam statuti (*) ad grave dampnum ipsius B.* *C.* pleads *not guilty*, ruled that *B.* shall not be received to give evidence against *C.* because he is the party grieved, and shall recover 20*l.* *M. 1650. B. R. Bacon's case, 2 Rot. Abr. 685, pl. 4.* and yet it seems he shall not recover the 20*l.* upon the indictment, but must bring his action upon the statute; and yet constant experience, and the very statute of 21 *H. 8. cap. 11.* that gives restitution of goods to the party prosecuting an indictment of felony makes it evident, that he may be, and indeed ought to be the witness to convict the felon, tho thereupon he is to have restitution of the goods stolen.

If the tenant robs his lord, or the lessee for life the reversioner, or a resiant the lord of the franchise that hath *bona felonum*, these may be witnesses upon an indictment or trial of the felon, notwithstanding the consequential advantage that accrueth by the attainder or conviction of the party, yet the credibility of their testimony is to be left to the jury. But if *A.* hath a promise or grant of the goods of *B.* arrested of felony in case he be convicted, I should never allow *A.* to be a witness

(f) 2 *R. A. 685. pl. 3.*

(g) 2 *R. A. 685. pl. 6. Styl. 233.* but this is now altered by 8 *Geo. 2. cap. 16.* for by that statute, "Any person inhabiting within the hundred or any franchise thereof shall be admitted as a witness on

"behalf of the hundred in the same manner, as if he were not an inhabitant of that hundred, but resided in any other hundred whatsoever.

(*) *Viz. 5 Eliz. cap. 9.*

to convict *B.* for he by his own act after the felony committed acquires the interest, and so acts and swears for his own advantage.

A. brings an appeal against *B.* for the death of *C.* his father or her husband, *A.* cannot be a witness against *B.* upon *not guilty* pleaded, because it is his or her own suit.

[282] But if *A.* be nonsuit upon the appeal, and so the prisoner is arraigned upon the appeal at the king's suit, now *A.* may be a witness, because now the prosecution is merely for the king.

If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* give evidence, that he is guilty, for then he should give evidence in his own cause; *vide supra*, cap. 28. p. 217. & Part I, cap. 26. p. 344. the case of the earl of *Lancaster*.

Nay, altho he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason, but it is performed by the *senior* judge, for as he cannot be a witness, so he cannot be a judge in *propria causa*.

And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an *essoïn de servitio regis*, the warrant under the great seal (*h*) is a good testimonial of it. *F. N. B.* 17. *Stat. Glouc.* cap. 8.

Now as touching the compulsory means to bring in witnesses they are of two kinds. 1. By process of *subpœna* issued in the king's name by the justices of peace, *oyer* and *terminer*, gaol-delivery, or king's bench, where the plea of *not guilty* is to be tried. 2. Which is the more ordinary and more effectual means, the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt in such refusal, and this is virtually included within their commission and by necessary consequences upon the statute of 1 & 2 *P. & M.* cap. 13. whereof before, p. 52.

But that which is a great defect in this part of judicial administration, is, that there is no power to allow witnesses their charges, whereby many times poor persons grow weary of attendance, or bear their own charges therein to their great hindrance and loss. (*)

II. As

(*h*) But not under the privy seal, 2 *Co.* Inst. 514. *supra* stat. *Gloucester*.

(*) On conviction, in general, for any felony, the reasonable expences of prosecution

II. As to the second matter in what manner the evidence is to be given.

Regularly the evidence for the prisoner in cases capital is given without oath, tho the reason thereof is not manifest, (*i*) but [otherwise it is] in all cases not capital, tho it be misprision of treason: neither is counsel allowed him (*k*) to give evidence to the fact, nor in any case, unless matter of law doth arise. 1 *H. 7. 23. Co. P. C. p. 137.*

But in some special felonies by act of parliament the prisoner's witnesses in cases capital shall be examined upon oath at his trial, namely the statute of 31 *Eliz. cap. 4.* against imbezzelling of the king's ordnance, giving liberty to the prisoner to make lawful proof by witness or otherwise, seems virtually to allow the prisoner's testimony upon oath. *Co. P. C. cap. 22. p. 79.*

And the statute of 4 *Jac. cap. 1.* touching felonies upon the borders, &c. gives examination of the prisoner's witnesses upon oath.

If a witness be produced and sworn for the king, yet if that witness alledge any matter in his evidence, that is for the prisoner's advantage, (as many times they do,) that stands as a testimony upon oath for the prisoner, as well as for the king.

Regularly the king's evidence is given upon oath against the prisoner, and ought not to be admitted otherwise than upon oath; nay, instances have been given of very young witnesses sworn upon evidence in capital causes, *viz.* one of nine years old. *Dal. [284] ton's Justice, cap. 111. p. 297. (l)*

Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their infor-

mation are by *stat. 25 Geo. 2. c. 36.* to be allowed to the prosecutor out of the county flock, if he petitions the judge for that purpose; and by *stat. 27 Geo. 2. c. 3.* poor persons, bound over to give evidence, are likewise intitled to be paid their charges, as well without conviction as with it.

(*i*) Nay, it is manifestly against all reason, that the prisoner should not be allow'd the same liberty to make out his innocence, as is allowed to prove his guilt, and tho it has been an usual practice not to suffer witnesses for the prisoner in capital cases to be examined upon oath, yet as lord Coke observes *P. C. p. 79.* there is not so much as *seintilla juris* for it, it being unsupported by any act of parliament, antient author, book case, or record: See Sir John Hawles's remarks on College's trial. *State Tr. Vol. IV.*

p. 178. To remedy this inconvenience it was provided by 7 *H. cap. 3.* "That every person indicted for high treason, whereby corruption of blood may be made, shall be admitted to make his defence by witnesses on oath," but this statute being defective it is further provided by 1 *Ann cap. 9.* "That the witnesses for the prisoner in any trial for treason or felony shall give their evidence upon oath in like manner, as the witnesses for the crown, and if convicted of perjury shall be subject to the same penalties, forfeitures, &c."

(*k*) Upon an indictment, but it is otherwise in an appeal. *Corone* 31. 9 *E. 4. 2. a. 1 H. 7. 26. a.*

(*l*) *N. Edit. cap. 164. p. 541.*

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mation have heard their testimony without oath, which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practised upon children: *vide supra*, Part I. *cap.* 24. *p.* 302 & *cap.* 58. *p.* 634. & *supra*, *p.* 279.

2 Hawk. P. C. ch. XLVI. of evidence per tot. Burn. tit. evidence. 4. Blacks. Com. ch. 27. *pa.* 356, 360. See Index to Folter. tit. Evidence. Overt-acts, Witnesses. 2. Wilson: 23. seems Contra'. 1. Wilson, 84. 1. Atk. 21.

C H A P. XXXVIII.

Concerning evidence in writing.

BY the statute of 1 & 2 P. & M. *cap.* 13. and 2 & 3 P. & M. *cap.* 10. Justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses, (the examinations to be without oath, the informations to be upon oath,) and are to put the same in writing, and are to certify the same to the next gaol-delivery.

These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.

But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I have often known the [285] prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession; and the reason why these examinations and informations are allowable in evidence (under the cautions above premised,) is, because they are judges of record, and the informations before them upon oath are authorised and required by act of parliament, and they are judges of the crimes upon which the informations are taken.

Welsh forceably took away Mrs. *Puckring* and married her, and thereupon a temporary act of parliament was obtained, enabling commissioners

missioners therein named to hear and determine that marriage, and to dissolve it, if there were cause: In that cause Mrs. *Puckring* herself was examined touching the manner of the marriage, as a supplemental proof, and died hanging the suit, *Wells* was after indicted upon the statute of 3 H. 7. for this fact for felony, and it was moved, that this examination of Mrs. *Puckring* might be read in evidence against the prisoner, but it was denied. 1. Because it was a proceeding according to the civil law in a civil cause. 2. Because that suit was originally at the instance of Mrs. *Puckring* and her own cause, and tho she be according to the civil law examinable, as a supplemental proof, yet it was a cause for her own interest, and therefore at common law not allowable, tho the commissioners that took the examination were judges constituted by that which then was allowed to be an act of parliament. *M. 1652. B. R.*

A. commits a felony in the county of *B.* and flies into the county of *C.* and there is taken and brought before a justice of peace of the county of *C.* where *A.* is examined, and informations upon oath taken by that justice, tho the justice of peace of the county of *C.* had not an original cognizance of a felony committed in the county of *B.* yet these examinations and informations being transmitted into the county of *B.* where *A.* is indicted, may be read in evidence against him. *Dalt. Just. cap. 111. p. 299.* for tho he hath not an original jurisdiction of the cause, yet he hath a consequential jurisdiction thereof, having the party before him, and it is in order to the preservation of the peace.

If a justice of peace takes information in a case of high treason, it seems these cannot be read in evidence upon an indictment of treason, because high treason is not within that commission, but it is of use only, as an information upon oath, which they may take, tho they cannot proceed upon it, for all treason is a breach of the peace; *quære tamen*, if it be not allowable to be given in evidence. [286]

See Burn. Tit. Evidence, Sect. II. of written evidence.

C H A P. XXXIX.

Concerning evidences requisite, or allowed by acts of parliament, and presumptive evidence.

BY the statutes of 1 *E. 6. cap. 12.* 5 *E. 6. cap. 12.* there ought to be two witnesses to an indictment of high treason, and these witnesses are to be sworn before the jury also upon his trial, unless he willingly without violence confess the same.

These two witnesses are still required upon his indictment, and it is not altered by the statute of 1 & 2 *P. & M. cap. 10.* which restores the common law trial, but extends not to the indictment. *Co. P. C. cap. 2. p. 25. vide supra, Part I. p. 298.*

A confession upon examination before a competent judge before indictment is such a confession, as the statute allows. *Co. P. C. ubi supra*, and so it was agreed in the case of *Tonge* and others, 14 *Car. 2. (a)*

If one witness be positive, and the other witness is only by hearsay, these are not two lawful accusers within the statute, agreed by all the justices in the lord *Lumley's* case *Hill. 14 Eliz. cited Co. P. C. ubi supra* against the opinion in *Dy. 99. b. Thomas's* case; but two witnesses are not requisite either upon the indictment or trial of treasons for counterfeiting money by the express proviso of the statute of 1 & 2 *P. & M. cap. 11.* which directs, that in all treasons for counterfeiting or impairing of coin the offenders shall be indicted, arraigned, tried, convicted and attaint by such evidence, and in such manner as was used before. 1 *E. 6.*

The words of the statute 5 & 6 *E. 6. cap. 11.* are, “That no person shall be indicted, convicted, or attaint for any the treasons aforesaid, or for any other treasons, that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done, unless the same offender be thereof accused by two lawful accusers, &c.” It may be considerable, whether this act extends to treasons *de novo* made by act of parliament after 5 & 6 *E. 6. (b)*

If such new treasons be enacted after, as that of 5 *Eliz. cap. 11.* and 18 *Eliz. cap. 1.* concerning clipping and washing of coin, and also 1 *Mar. cap. 6.* which have this expression (*being thereof lawfully con-*

(a) *Kel. 18. vide Part I. p. 304.*

(b) See *Kel. 9, 1^o, 49. vide Part I. p. 297.*

vict or attaint, according to the due order and course of the laws of this realm shall suffer death, &c.) there seems to be no necessity of two witnesses upon the indictment or trial. 1. Because, according to the due order and course of the laws seems to intend common law (c). 2. But if there were doubt of that, yet in these acts concerning coin the statute of 1 & 2 P. & M. cap. 11. enacts, "That all offenses concerning counterfeiting, forging, or impairing any coin current within the realm, shall be indicted, arraigned, tried, convicted and attaint by such evidence, and in such manner, as hath been used before the first year of E. 6." therefore, if the statute of E. 6. should be construed to refer to any future statute making treason, there will be the same reason to carry over the statute of 1 & 2 P. & M. cap. 11. to the treasons enacted against impairing of coin by 5 & 18 Eliz.

But yet, as to other treasons, it may be very questionable, [288] whether 5 & 6 E. 6. doth as to this point extend to treasons newly enacted after, 1. Because tho a former act may direct the proceedings upon a new offense made after, (as the statutes of 18 Eliz. cap. 5. 31 Eliz. cap. 5. concerning informers, 21 Jac. cap. 4. concerning suing informations in the proper county, and pleading the general issue,) yet this doth not *in terminis* extend to offenses to be committed against statutes to be made, but only in all other treasons hereafter to be committed (d). 2. Because most commonly in the acts, that after 5 & 6 E. 6. enacted new treasons, if the parliament intended two lawful witnesses, it most commonly expresseth it accordingly; *quare*, for 1 & 2 P. & M. cap. 11. seems to import, that in new treasons concerning counterfeiting foreign coin made current by proclamation, there would have been a necessity of two witnesses by the statute of 5 & 6 E. 6. and therefore provides against it.

By the statute of 21 Jac. cap. 27. the mother of a bastard child concealing it's death shall suffer as in murder, unless she prove by one witness, that the child was born dead; this statute stands yet continued

(c) I cannot see why these general words should be confined only to the *common law*, since the *laws* in the plural number do as fully express, and seem most naturally to include all the laws of the land, whether common or statute.

(d) The statute of 5 & 6 E. 6. seems expressly & *in terminis* to extend to treasons, which should be afterwards enacted; what else can be the meaning of the words, *any other treasons, that now be, or hereafter shall be?* for these words cannot reasonably be

intended only of offenses hereafter to be committed, because that is provided for by the other words immediately following, *which shall hereafter be perpetrated, committed or done*: but to obviate all doubts, it is since provided by 7 W. 3. cap. 3. "That in all cases of high treason, whereby any corruption of blood shall ensue, no person shall be indicted, tried or attainted, but upon the oaths of two lawful witnesses."

among many others by a clause in the latter end of the act for relief of the northern army. 16 *Car.* 1. *cap.* 4. (*) until by parliament it be otherwise enacted.

The indictment to put the prisoner to this proof by one witness, that the child was dead born, must contain this special matter, that the prisoner was delivered of a child, which by the laws of the kingdom was a bastard, and that it was born alive, and shew how she killed it.

[289] But the indictment need not allege, that she concealed it, but it must be proved upon evidence, (d) if advantage be taken of this statute against her.

The indictment doth not conclude *contra formam statuti*, for the statute only directs the evidence, where the case is within it, but created not a new crime. (e)

If there be no concealment proved, yet it is left to the jury to inquire, whether she murdered it or not, by those circumstances that occur in the case, as if it be wounded or hurt, &c. but it doth not put her upon an absolute necessity of proving it born alive by one witness, and so the evidence stands but as at common law.

If upon the view of the child it be testified by one witness by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumstances, this I have always taken to be a proof by one witness, that the child was born dead, so as to leave it nevertheless to the jury, as upon a common law evidence, whether she were guilty of the death of it or not.

In some cases presumptive evidences go far to prove a person guilty, tho there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished, than one innocent person should die.

If a horse be stolen from *A.* and the same day *B.* be found upon him, it is a strong presumption that *B.* stole him, yet I do remember before a very learned and wary judge in such an instance *B.* was condemned and executed at Oxford assises, and yet within two assises after *C.* being apprehended for another robbery and convicted, upon his judgment and execution, confessed he was the man that stole the horse, and being closely pursued desired *B.* a stranger to walk his horse for him, while he turned aside upon a necessary occasion and escaped; and *B.* was apprehended with the horse, and died innocently.

(*) *Vide* 3 *Car.* 1: *cap.* 5. §. 22. *in fine.*

(d) If no intent to conceal, it is not murder within the statute, tho no body

were present at the time of the delivery. *Kelc* 33.

(e) See *Ann Davis's case*, *Kel.* 32.

I would

I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods.

I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead (*f*), for the sake of two cases, one mentioned in my lord *Coke's P. C. cap. 104. p. 232.* a *Warwickshire* case (*g*).

Another that happened in my remembrance in *Staffordshire*, where *A.* was long missing, and upon strong presumptions *B.* was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon *B.* was indicted of murder, and convicted and executed, and within one year after *A.* returned, being indeed sent beyond sea by *B.* against his will, and so, tho *B.* justly deserved death, yet he was really not guilty of that offense, for which he suffered.

But of all difficulties in evidence there are two sorts of crimes, that give the greatest difficulty, namely rapes and witchcraft, wherein many times persons are really guilty, yet such an evidence, as is satisfactory to prove it, can hardly be found; and on the other side persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt. *Tutius semper est errare in acquietando, quàm in puniendo, ex parte misericordiæ, quàm ex parte justitiæ.*

See 2 Hawk. P. C. ch. 46. sect. 42. 43.

(*f*) This was also a rule in the civil law. *Dig. Lib. XXIX. Tit. 5. §. 24.*

(*g*) That case was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offence, she was heard to say, *Good uncle do not kill me*; after which time the child could not be found, whereupon the uncle was committed upon suspicion of murder, and admonished by the justices of assize to find out the child by the next assizes, against which time he could not find her, but

brought another child as like her in person and years as he could find and apparelled her like the true child, but on examination she was found not to be the true child; upon these presumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a stranger, and afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child.

C H A P. XL.

Concerning variance between the indictment and evidence, and where the evidence proves the indictment, and where not.

IF *A.* be indicted, that the first of July 21 *Car.* 2. he robbed or murderd *B.* and upon evidence it appears, that it was committed another day, or another year, either after or before the time laid in the indictment, yet this proves the issue for the king; only it is requisite, if there be an escheat in the case, and that the felony were committed after the day laid in the indictment, for the jury to find the day, because the relation of the escheat to avoid mesne grants and incumbrances relates to the time of the felony committed 32 *Eliz.* per omnes *justic' Co. P. C. cap.* 104. p. 230.

If *A.* be indicted for a robbery or murder *apud A. in com' B.* if it were committed in another county, regularly he ought to be found *not guilty*, because regularly an offense of that nature in one county is not presentable out of the county where it was done, but tho it were done in another vill in the county of *B.* yet he is to be found guilty, for the vill is not material.

If the evidence in murder differ from the indictment *in specie mortis*, as if the indictment were for killing by poison, and the evidence be of killing by stabbing, it doth not maintain the indictment. 9 *Co. Rep.* 67. a. *Mackally's case.*

But if the indictment were for poisoning with one kind of poison, and the proof be of another kind of poison, or the indictment be for killing with a sword, and the evidence be of killing with a staff, or with a gun, it maintains the indictment, for the common effectual word in both is *percussit*: vide 9 *Co. Rep.* 67. a. *Mackally's case, Co. P. C. cap.* 62. p. 135. Sir *Thomas Overbury's case.* (a)

[292] And the same law holds in relation to the accessaries to such principals, and with the same difference.

If *A. B. and C.* be indicted for the murder of *D.* and it is laid in the indictment, that *A.* gave him the stroke, whereof he died, and that *B. and C.* were *præsentes, auxiliantes & abettantes*, tho upon the evidence it appears, that *B.* alone gave the stroke, whereof he died,

and *A.* and *C.* were *præfentes, auxiliantes & abettantes*, it maintains the indictment, for they are all principals, *Mackally's case, ubi supra. (b)*

If *A.* and *B.* be indicted of the murder of *C.* and upon the evidence it appears, that *A.* committed the fact, and *B.* was not present, but was accessary before the fact by commanding it, *B.* shall be discharged. 26 *H. 8. 5.*

If *A.* and *B.* be indicted as principal, and *C.* is indicted as accessary to both after the fact done, *A.* and *B.* are convicted, or only *A.* is convicted, and upon the evidence against *C.* it appears he was accessary only to *A.* it maintains the indictment. 9 *Co. Rep.* 119. *a.* *lord Sanchar's case per curiam. (c)*

A. is indicted for murdering *B.* *ex malitiâ præcogitatâ*, evidence of malice in law, as killing an officer or watchman in the execution of his office, or killing a man without any provocation maintains the indictment, because the law interprets it malice. 4 *Co. Rep.* 67. *b.*

A. is specially indicted upon the statute of 1 *Jac. cap. 8.* for stabbing *B.* not having a weapon drawn, nor stricken first, *contra formam statuti*, upon the evidence it appears, that the person kild struck first, yet it is good evidence to convict *A.* for manslaughter. *H. 23 Car. 1. Harwood's case. (d)*

So if *A.* be indicted for petit treason for killing his master *felonicè, proditoriè, & ex malitiâ suâ præcogitatâ*, tho he were not his master, he may be found guilty of murder, *(e)* and tho it were not *ex malitiâ præcogitatâ*, he may be found guilty of manslaughter, and not guilty as to the petit treason; and so I have known it ruled oftentimes.

So if a man be indicted of burglary, and *quòd felonice & burglariter cepit bona, &c.* he may be acquit of the burglary, [293] and found guilty of simple felony, if the evidence riseth no higher.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, an evidence proving the killing upon a sudden falling out is a good evidence to prove him guilty of manslaughter, and the jury ought accordingly to find it. *Plow. Com.* 101. *a.* *Co. Lit.* 282. *a.* And so in an appeal.

2 Hawk. P. C. ch. 46. sect. 36, 37, 38, &c. &c.

(b) See 1 *Salk.* 334. *Wallis's case.*

(c) *Vide Part I. p. 624.*

(d) *Style* 86.

(e) *Vide Part I. p. 378. & postea, cap. 46. sub fine.*

C H A P. XLI.

Concerning the demeanor of the jury, and how their verdict is to be given.

AFTER the arraignment of the prisoners, and their pleas of *not guilty* received and recorded, the sheriff returns the pannel of the jury, the prisoners are again called to the bar, and the jury being called, and appearing the prisoners are told by the clerk, that these good men now called and appearing are to pass upon their lives and deaths; therefore, if they will challenge any of them, they are to do it before they are sworn.

If no challenge hinder, the jury are commanded to look on the prisoners, and then severally twelve of them, neither more nor less, are sworn, *You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoners at the bar, whom you shall have in charge, [and true verdict give] according to your evidence. So help you God.*

After the jury sworn proclamation is to be made, "That if any can inform for our lord the king against the prisoners at the bar, let them come forth and they shall be heard;" then the prisoners are called successively to the bar, first *A.* and he is commanded to hold up his hand, the indictment is repeated, "To this he hath pleaded *not guilty*, the issue is to try, whether he be guilty or not guilty; if you find him *guilty*, you shall say so, and inquire what goods or chattels, lands or tenements he had at the time of the felony or treason committed, or at any time after. And if you find him *not guilty*, you shall inquire, whether he did fly for it, and if you find, that he fled for it, you shall inquire of his goods and chattels, and if you find him *not guilty*, and that he did not fly for it, you shall so and no more. Hear your evidence."

I have set down the clerk's charge to the jury, because it contains the effect of their inquiry.

Tho there be twenty prisoners at the bar for several felonies, and the oath is general to try between the king and the prisoners at the bar, yet the jury is to inquire of no more than what they are particularly charged with, as before; and therefore, tho twenty have pleaded,

ed, and stand at the bar when the jury is sworn, yet the court may stay at any number of the prisoners, and so the jury stand charged with no more than what are thus particularly charged upon them.

And when they go from the bar, and have brought in their verdict touching these particulars thus charged upon them, then, if the same jury pass upon the remaining prisoners, yet they are to be called over again, the prisoners reminded of their challenges, and the jury sworn *de novo* upon the trial of the rest of the prisoners.

For in law the jury is charged with no more than those, that have their indictments and plea of *not guilty*, and evidence concluded against and for them before the jury, tho possibly all the prisoners, that have pleaded, stood at the bar, when the jury was first sworn; and this is the constant course at *Newgate*.

By the antient law, if the jury sworn had been once particularly charged with a prisoner, as before is shewed, it was commonly held they must give up their verdict, and they could not be discharged before their verdict given up, and so is my lord *Coke*, *P. C.*

cap. 47. *p.* 110. and this is the reason given 22 *E. 3. Coron.* [295]

449. why after the plea of *not guilty*, and the inquest charged, the prisoner cannot become an approver, because the inquest shall not be discharged; but the book at large, *viz.* 21 *E. 3. 18. a.* mentions not the charging of the inquest, but the plea of *not guilty* and the jury at the bar. *Co. Lit.* 227. *b.* But yet the contrary course hath for a long time obtained at *Newgate*, and nothing is more ordinary than after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the court, that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, tho not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner, and remit him to the gaol for farther evidence, and accordingly it hath been practised in most circuits of *England*, (a) for otherwise many

(a) And so it was resolved in *Widdowes's* case in treason, 20 *State Tr. Vol.* 11. *p.* 710, 827. See also *Kel.* 47. 52. But the reason given for this practice, if it were law, (which yet without a prisoner's consent is unwarranted by antient usage; vide 3 *Co. Inst.* 110. *Co. Lit.* 227. *b.* 1 *And.* 103. *Raym.* 84. *State Tr. Vol.* 11. *p.* 951.) seems to hold as strongly in favour

of the prisoner as of the king. *State Tr. Vol.* IV. *p.* 195. and yet I do not find any instance, where a jury once sworn was ever discharged, because the prisoner's evidence was not ready; on the contrary in lord *Rafle's* case, they were refused to put off the trial until the afternoon of the same day, pretending they could not do it without the consent of the attorney general.

many notorious murders or burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched out or given.

If after the jury sworn and departed from the bar, one of them, viz. *A.* wilfully goes out of town, whereby only eleven remain, these eleven cannot give any verdict without the twelfth, but the twelfth shall be fined for his contempt, and that jury may be discharged, and a new jury sworn, and new evidence given, [296] and the verdict taken of the new jury, and thus it was done by good advice at the gaol-delivery at *Hertford Aug. 15. Car. 1.* in the case of *Hauscom* the departing jurymen.

And so it is usual at the gaol-delivery at *Newgate*, if a jury be charged with several prisoners, and the court finds by probable circumstances, that the jury is partial to one of the prisoners, the court may discharge the jury of that prisoner, and put him upon his trial by another jury, and this is used also in other circuits. (*)

Upon *not guilty* pleaded twelve are sworn to try the issue, after their departure *A.* one of the twelve leaves his companions, which being discovered to the court, by consent of all parties *B.* another of the pannel is sworn in the place of *A.* and afterwards *A.* returns to his company, which being made known to the court, *A.* is called and examined why he departed, he answered to drink, and being examined, whether he had spoken with the defendant, denied it upon his oath, whereupon *B.* was discharged from giving any verdict, and the verdict taken of *A.* and the other eleven, and *A.* fined for his contempt, 34 *E. 3. Office de Court* 12. in trespass.

If thirteen are by mistake sworn, the swearing of the last of the thirteen is void, and the other twelve shall serve.

If only eleven be sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error; and so in a presentment, but if twelve be recorded sworn, no averment lies, that one was unsworn. *Lamb's Justice* 395.

alho in that case the jury were not sworn, and the prisoner urged, that he had witnesses, who could not be in town till night, in which case it was certainly in the discretion of the court to put it off or not. *State Tr. Vol. III. p. 630, 631.* It hath however been since holden for law, that a jury once charged in a capital case cannot be discharged, till they have given their

verdict, and the case of *Whitebread* was thought a very extraordinary one. See lord *Delamere's* case, *State Tr. Vol. IV. p. 232.* and *Rockwood's* case, *State Tr. Vol. IV. p. 639, 651.* and *Cook's* case, *State Tr. Vol. IV. p. 751.* *Foster* 16, 39, 76, 328.

(*) *Quære de hoc.*

The justices at common law may upon a just cause remove a juror after he is sworn. 20 *H. 6. 5. a.*

When the jurors depart from the bar, a bailiff ought to be sworn to keep them together, and not to suffer any to speak with them.

After their departure they may desire to hear one of the witnesses again, and it shall be granted, so he deliver his testimony in open court, and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court.

The jury must be kept together without meat, drink, fire, or candle, till they are agreed, 24 *E. 3. 75. (b) Co.* [297] *Lit. 227. b.*

If they agree not before the departure of the justices of gaol-delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdict in a foreign county; *quare*, whether in such cases the session may be adjourned before the verdict taken. 19 *Affiz. 6. per Scot. 41 Affiz. 11.*

If there be eleven agreed, and but one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven, no nor yet the refuser fined or imprisond, and therefore where such a verdict was taken by eleven and the twelfth fined and imprisond, it was upon great advice ruled the verdict was void, and the twelfth man deliverd, and a new *venire* awarded. 41 *Affiz. 11.* for men are not to be forced to give their verdict against their judgment (*c*); *vide P. 20 E. 1. Rot. 43. Norf. coram rege.*

In

(*b*) *N. Edit. of year books 24. a.*

(*c*) But is it not a force, when any of the jurors are obliged to comply under the peril of being starved to death, for how can it be expected, that twelve considering men should in all cases happen to be of the same sentiments? and therefore anciently it was not necessary, (at least in civil causes,) that all the twelve should agree, but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion, and if after such examination both sides persisted in their former opinions, the court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*; thus in a great assize upon a writ of right between the abbot of *Kirkstede* and *Edmund de Hyneswurt* eleven of the jury found for the abbot, and one for *Edmund de Hyneswurt*, in this case the verdict of the eleven was

first recorded, *Robertus de Harblinge & omnes alii præter Radulphum filium Simonis dicunt super sacramentum suum, &c.* and then follows the dictum of the twelfth *Et prædictus Radulphus filius Simonis dicit super sacramentum suum, &c.* then follows the judgment, *Sed quia prædicti undecim concorditer & prædicti dicunt, quod prædictus abbas & ecclesia sua prædicta majus jus habeant tenendi &c. ideo consideratum est, quod prædictus abbas & successores sui teneant prædicta tenementa de cetero in perfectum, &c. Placita coram iusticiis itinerantibus in com' Lincoln anno 56 Hen. 3. Rot. 29. in dorso.*

In an assize of novel disseisin between *William Tristram* plaintiff, and *John Simenel* and others defendants, where the whole jury consisted of only eleven, ten found for *Tristram*, and one for *Simenel*, and both verdicts are recorded in this manner, *Decem jurati dicunt, quod, &c. & undecimus juratorum, scilicet et Johannes Kinet dicit, &c. Et, quia dicto majoris partis juratorum statum*

In capital causes, whether upon indictment or appeal, no verdict can be given by default in the absence of the party. 16 *Affiz.* 13.

But if the prisoner hath pleaded to the country, and when [299] he is to be tried will say nothing, yet no penance shall be inflicted, but the jury shall be taken. 15 *E.* 4. 33. *b.*

Now touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Affiz.* 27. 40 *Affiz.* 10.

If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court

dum est, quod prædictus Willielmus recuperet seisinam suam de prædictis tenementis versus prædictos Johannem & alios per visum recognitorum & dampna quæ taxantur per jur' ad duas mareas & Johannes & alii in misericordia. Pas. 14 E. 1. Rot. 10. coram Rege.

The like practice is supposed in the case here quoted by the author. *Pas. 20 E. 1. Rot. 43. coram rege*, which was thus, *Martin Fitz-Osbert* recovered seisin of certain lands, &c. in *West-Somerton* against the prior of *Buttolye* before *John de Lovetot* and *William de Pageham*, judges of assize in *Norfolk* anno 16 *E. 1.* The prior afterwards complained greatly, that injustice had been done him by *Lovetot* at the said assize, and thereupon the bishop of *Winchester* and others were ordered to hear the matter and do justice to the prior. Upon this *Lovetot* and *Pageham* were called before the said bishop, &c. and the prior objected to *Lovetot*, "Quod fieri fecit falsam irrotulationem in rotulis suis, & contrariam veredicto juratorum assisæ prædictæ, &c. & hoc paratus est verificare per prædictos juratores, qui omnes sunt superstites, &c." To which *Lovetot* and *Pageham* replied by justifying themselves, and insisting, "Quod benè, & itè procefferunt ad captionem illius assisæ, unde vocant recordum rotulorum suorum, &c." in which the judgment pronounced by *Lovetot* was entered in the following manner, "Et quia per prædictum assisam convictum [compertum] fuit, quod *Edricus*, de quo prædictus *Martinus* exivit, fuit liber homo & liberæ conditionis; & quamvis ipse *Edricus*, & exitus de ipso proveniens tenuissent de prædicto Priore & de prædecessoribus suis, tenementa sua in villenagio, & per villana servitia, hoc eis non præjudicat, quod minus corpora sua sint libera; eo quod nulla præscriptio temporis potest liberam sanguinem in servitutem reducere, ideo consideratum est, quod prædictus

Martinus recuperet inde seisinam suam, &c. Et *Johannes de Pykering* unus recognitorum præfatæ assisæ, pro eo quod in veredicto præfatæ assisæ, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud quam inter illos fuit provisum, sicut per examinationem eorum convictum [compertum] fuit, & mancaptus est per, &c. ideo ipse & mancaptores sui in misericordia. Et præceptum est vic', quod capiat prædictum *J. de Pykering*, & salvo, &c. ita quod habeat corpus ejus apud *Kenteford*, &c. ad faciendam redemptionem suam pro transgressionibus prædictis." The bishop of *Wynton* and his fellows then proceeded to examine *Lovetot* and *Pageham* touching the said judgment. "Et quia in consideratione super veredicto primæ assisæ compertum est, quod *J. de Pykering* unus recognitorum prædictæ assisæ, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud quam inter eos fuit provisum; & nichil de illo contrario in recordo prædicto specificatur sive declaratur; immo quod veredictum captum fuit & receptum, ac si omnes de uno & de eodem assensu fuissent in veredicto prædicto; nec etiam veredictum ipsorum undecim declaratur sive specificatur, &c. nec duodecim ab undecim fuit separatus, nec examinatus per se; nec undecim a duodecimo fuerunt separati, nec per se examinati &c. prout moris est in tali casu; & sic ex contrario veredicto subsecutum fuit iudicium non legi sive consuetudini regni consonum, videtur manifestè, quod recordum illud non est plenum, seu perfectum, in hoc casu, &c. Concordatum est quod assisa prædicta re-examinatur, &c." Upon this the sheriff was ordered, quod venire faciat hic &c. recognitores assisæ prædictæ, & quod scire faciat *Martin* to appear at the same day ad audiendum, &c. Postea ad prædictum diem venerunt recognitores as-

court go together again and consider better of it, and alter what they have delivered. *Plow. Com.* 211. *b.* *Saunder's case.*

But if the verdict be recorded, they cannot retract nor alter it. *Co. Lit.* 227. 7 *R.* 2. *Coron.* 108. 20 *Affiz.* 12. 5. *H.* 7. 22. *b.*

In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given. *Co. Lit.* 227. *b.* *Co. P. C.* 110.

If a man be arraigned upon an inquest of murder or manslaughter taken by the coroner, and be found *not guilty*, the jury that acquits him ought to inquire, who committed the fact, and that shall serve as an indictment against that person, that the jury find did the fact.

"*sise prædictæ. Et quia prædicti Johanes & Wilhelmus aliud recordati fuerunt, quàm compertum fuit per recordum rotulorum ipsius Johannis; & etiam quia juratores prædicti minus sufficienter fuerunt examinati super articulis prædictis, sicut patet in recordo prædicto, iteratò fuerunt juratores jurati, & examinati; qui dicunt super sacramentum suum, quòd prædictus Martinus fuit villanus ipsius Prioris die quo ejectionis fuit de prædictis tenementis, &c. Et quia compertum est, &c. & quòd Prior ad prædictam assisam coram præfatis J. & W. respondebat per ballivum suum, qui quidem ballivus non potuit deducere in judicium jus sanguinis nativi domini sui absque præsentia domini sui, &c. ac etiam in supradicto recordo quòd nulla præscriptio longi temporis potest liberum sanguinem in servitutem reducere, quòd omninò falsum est, &c. videtur, quòd judicium J. de Lovetot erroneum est; idèò consideratum est, quòd prædictus Prior renabeat prædicta tenementa, ita quòd omnia sint in eodem statu, in quo fuerunt ante captionem prædictæ assisæ.*" Afterwards by writ of error the record coram episcopo Winton and sociis suis auditoribus querelarum was. brought coram rege, and Martin Fitz-Osbert assigned for error, that he had recovered seisin against the said Prior "in grosso veredicto super disseisinà secundum legem communem; & auditores sine brevi regis inde eis directò, & sine aliqua præmunitione ipso Martino ritè factà, contra legem communem, ipsum à prædicto tenemento abjudicaverunt, & contra tenorem Magnæ Cartæ domini regis: Dicit insuper, quòd prædicti auditores venire fecerunt coram eis juratores præfate assisæ in formà certificationis, & ipsos juratores per sacramentum suum reexaminaverunt & admiserunt veredictum eorum contrarium ve-

"redicto per ipsos priùs pronuntiato; unde dicit, quòd in hiis & aliis erratum est, &c." To this the prior replied, that the said Martin had been "Præmunitus per breve, quod vocatus seire facias; & quòd prædicti auditores habuerunt plenam potestatem, tam per breve domini regis, quàm per speciale præceptum domini regis, ad corrigenda recorda justiciariorum vitiosa & erronea inventa & hoc satis constat domino regi & ipso confilio, & quòd prædictus Martinus non recuperavit per grossum veredictum; quia non fuit ibi veredictum nisi tale, quale imperfectum, quia per xi juratores captum; & quòd prædicti auditores non admitterent contrarium veredictum prioris veredicto, quia veredictum priùs captum coram J. de Lovetot fuit tale, quale imperfectum, & contra legem terræ captum per xi juratores, de statu sanguinis ultra tempus limitatum; secundum veredictum magis deberet dici suppletio prioris veredicti defectivi, quàm eidem contrariari." To which Martin rejoined. and insisted, "Quòd prædicta assisæ fuit plena & perfecta coram J. de Lovetot & sociis suis justis capta, & hoc liquat expressè in eodem recordo, ubi dicit Jurati dicunt, &c. Et quòd ipse recuperavit prædicta tenementa per grossum veredictum præfate assisæ, petit judicium, si prædictum grossum veredictum super disseisinà præcisè factà aliquo modo secundum legem & consuetudinem regni Angliæ debet adnichillari, absque brevi de attincta, &c.

The judgment in this case does not appear, but it should seem, that the reason why the record of the verdict is said to be imperfect was not, because all the twelve did not agree, but because the *dicta unusquisque partis* were not distinctly specified and recorded, which is declared to be the usage in such case, *pro ut nunc est in tali casu.*

But

But it is held, that if a man be arraigned upon an indictment found by the grand inquest, and be acquitted, the jury shall not make such further inquiry. 14 *H.* 7. 2. *b.* 13 *E.* 4. 3. *b.* 37. *H.* 8. *B. Coron.* 117. 11 *H.* 4. 93. *a.* *B. Coron.* 32. 21 *E.* 3. 17. *b.* *B. Coron.* 39.

But surely the antient law was otherwise, and that the jury that acquits, whether upon a presentment, or upon an indictment of homicide, shall be chaced to say, who did the fact. 37 *Affiz.* 13.

So if a man be indicted *de morte cujusdum ignoti*, the inquest shall be charged to tell the name, if they can. 2 *E.* 3. *Coron.* 159.

A man is indicted of robbery and acquitted, but it appeared to the court, that a robbery was done, but the prisoner *not guilty*, and therefore upon the statute of *Winehester* the court compelled the jury to present who did it, for the hundred is to answer for the bodies of the offenders, and the book concludes generally, *Et tiel course tiendra, ou home est indite de mort de home & acquit* 3 *E.* 3. *Iter North. Coron.* 307. so that they made no difference, where the [indictment was by the grand inquest, or by the coroner's inquest.]

The same law in a appeal 22 *Affiz.* 39. *Coron.* 178. 4 *H.* 7. *Rot.* 21. *Rastal's Entries* 57. *a.*

[301] But at this day the law and practice hath obtained, that only upon an arraignment upon the coroner's inquest the jury, if they acquit the prisoner, shall inquire who did the murder or manslaughter, and commonly it is a business of form, for they usually say, if it be not known, that *John a-Nokes* did it. 37 *H.* 8. *B. Coron.* 32. 21 *E.* 3. 17. *b.* *B. Coron.* 39. *Dy.* 238. *b.*

And as to indictments of robbery, if the petit jury acquit the prisoner, they do not inquire who did it, and the reason of the difference is, that for the most part in *Eyre* the petit jury were all of the same hundred, where the offense was committed, and then upon the statute of *Winton* the hundred were to answer *de corporibus malefactorum*, and therefore it was reason to put them upon the inquiry, who committed the robbery, if it appears to the court, that a robbery was committed, and the case of 3 *E.* 3. *Coron.* 307. was in *Eyre*, but now the jury, that tries, as well as inquires, is for the most part of the rest of the county, and therefore they answer only the point of *guilty* or *not guilty*: *vide Stamf. P. C.* 181. *a.*

The jurors of the petit inquest are charged to inquire if the party fled, and so of his goods and chattels, this is but an inquest of office, and traversable; *vide supra Part I. cap.* 27. *p.* 362. But it hath been held, that

that a presentment of flight before the coroner *super visum corporis* is conclusive to the party, and not traversable: *vide quæ supra dixi, Part I. cap. 31. p. 416, 417.*

And therefore it is, that if the coroner's inquest *super visum corporis* present a *fugam fecit*, and the party be taken and arraigned, and pleads to that indictment, the jury shall not be charged to inquire of the *fugam fecit*, because found before by the coroner's inquest, and if they be charged therewith and acquit the prisoner, and likewise say, that he did not fly, yet the record of the inquisition before the coroner finding the flight shall take place to intitle the king. 3 E. 3. *Forfeiture* 35. P. 7 Eliz. Dy. 238. b.

The jury may find a special verdict, or may find the defendant guilty of part, and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner. [302]

If a man be indicted of burglary, *quod felonice & burglariter cepit & asportavit*, the jury may find him guilty of the simple felony, and acquit him of the burglary and the *burglariter*.

So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery.

The like where the indictment is *clàm & secretè à personâ*.

So if a man be indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury may acquit him upon the statute, and find him guilty of manslaughter at common law. 23 Car. 1. *Harwood's case (d)*.

So if a man be indicted of stealing of goods of the value of 10s. the jury may find him guilty only of goods to the value of 6d. and so guilty only of petit larceny. 41 E. 3. *Coron.* 451. *Stamf. P. C. L.* III. cap. 9. fol. 165. a.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, the jury may find him guilty of manslaughter. *Co. Lit.* 282. a. or that he killed him *se defendendo*, or *per infortunium*; but *nota* in these cases it is not sufficient generally to find it done *se defendendo*, or *per infortunium*, but the special matter must be set down how it was done, and if upon the special matter shewn it shall appear to be murder or manslaughter, the court will accordingly judge of it, tho the jury conclude, *Et sic per infortunium*, or *sic se defendendo*. 3 E. 3. *Coron.* 284, 286, 287, & 43. *Affiz.* 31. *Coron.* 226.

(d) *Style* 86.

And

And in these cases, tho it be found *per infortunium*, or *se defendendo* upon the special matter set forth, yet this special matter must be recorded, for tho it be not such a felony, as hath judgment of life, yet it is such an offense, as gives the forfeiture of goods, and therefore they may not find a general *not guilty*, but must find the special matter, and leave it to the court to judge.

[303] At the sessions at *Newgate* 16 *Car.* 2. upon the evidence it appeared, that *A.* a boy riding in the street upon an horse, *B.* another boy whipt the horse, the horse ran away against the will of *A.* and ran over a child and kild it, for this *A.* was indicted of murder by the grand inquest, and the jury found him generally *not guilty*; the court was in doubt of receiving the verdict, because it was *per infortunium*, and so ought specially to be found, but because the coroner's inquest had found the special matter, and concluded it, as in truth it was, *per infortunium*, which presentment *A.* was ready to confess, that so he might have his pardon of course, the verdict of *not guilty* was recorded, and so it was said was the usual course in that case; but it was agreed, that if *A.* had of his own accord put the horse into speed, and he had so kild the child, it had not been *per infortunium* but manslaughter. *Richard Pretty's* case for killing *Anne Jones*.

But now suppose the prisoner kild the party, but yet in such a way as makes no felony, as if he were of *non sane memory*, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defense kills one, that assaults him in the execution of his office, which are neither felony nor forfeiture, whether is it necessary to find the special matter, or may the party be found *not guilty*? *Foster* 265.

And I think, and so I have known it constantly practised, the party in these cases may be found *not guilty*, and the jury need not find the special matter.

And the reason is, that in these cases there is neither felony nor forfeiture. *

And this is in effect declared by the statute of 24 *H. 8. cap. 5.* “ If
 “ any attempt to commit murder, robbery or burglary in or nigh
 “ any common high way, or in the mansion-house, &c. and the evil
 “ doer be slain, and if the same by verdict be found or tried, the
 “ slayer shall not lose any goods or chattels, but shall thereof be
 “ fully acquitted and discharged in like manner as he should be, if
 “ he

“ he were lawfully acquit of the death,” and accordingly ruled in *Cooper’s* case. *P. 15 Car. B. R. Croke, p. 544.*

But it is used in such cases (and prudently enough), for the coroner’s inquest to find the special matter, and the bill [304] of indictment of the grand jury to be for murder, and to have the party arraigned upon the bill of indictment, and to be acquitted thereupon upon trial, and to enter the acquittal upon the bill, and then to confess the coroner’s presentment, and to have judgment also thereupon; thus it was done in the case of *Richardson* keeper of *Newgate*, who kild *Hyde*, that had committed a robbery and made resistance, that he could not be taken without being kild. *M. 25 Car. 2. at Newgate.*

And therefore, where a thief was kild in pursuit because of necessity, if the special matter be found, the killer shall have judgment, *quod eat sine die.* 22 *Affiz.* 55. *Coron.* 179. 22 *E. 3. Coron.* 258. 26 *Affiz.* 23. *Coron.* 192. 22 *E. 3. Coron.* 261. and the reason is, because it is no felony, nor causeth any forfeiture so much as of goods, but is a justifiable act, and so differs from *se defendendo*, or *per infortunium*, which give a forfeiture of goods.

And since in an indictment or an appeal of felony the defendant cannot plead a justification, he shall have the advantage of it upon the general issue pleaded. 26 *H. 8. 5. b.* 37 *H. 8. B. Appeals* 122.

Yet *vide* 37 *H. 6. 20 & 21. per Needham* upon an indictment of murder the defendant may plead, that in an appeal before the constable and marshal of treason he being appellee kild the appellant; yet in that case it seems, if he pleaded *not guilty*, he shall have advantage of that special justification upon evidence.

But [notwithstanding] this, that I have said, where the matter itself appears not to be felony, the prisoner upon *not guilty* pleaded may be found *not guilty*, without finding the special matter, and accordingly ruled. *P. 15 Car. 1. Croke, p. 544.*

Yet if the coroner’s inquest find not the special matter but murder or manslaughter, and the prisoner is arraigned upon it and plead *not guilty*, and upon the evidence it appear, that the prisoner kild the man, but in such a manner as makes no felony, as a thief that assaults him upon the highway, or a thief that resists [305] the arrest, in this case the jury cannot find a general *not guilty*, but must find, that the prisoner did it, and the manner how, and this is to be entred of record, as in case of a verdict *se defendendo*.

And the reason of the difference is, because in the former case the jury gives a verdict of *not guilty* generally, without inquiring who did the fact. But where a man is arraigned upon the coroner's inquest *super visum corporis*, and pleads *not guilty*, if the jury acquit the prisoner by *not guilty*, yet they must inquire who did it, for here it is apparent there was a man slain, because the coroner takes the inquest upon view of the body, and if they should find him generally *not guilty*, and yet should upon their other inquiry find he kild him, it would be a contradiction in itself, and therefore in this case, they are to find the special matter, and thereupon the court shall give judgment for his discharge.

Many special verdicts have been found, as upon the statute of stabbing, so upon the point, whether murder or not, but it is difficult to find them so that judgment may be given for murder, because there are so many circumstances required to be found, that if any be omitted, the verdict will fall only to manslaughter.

I have rarely known upon any special verdict, where the question was murder or manslaughter, judgment to be given for murder (*d*), but commonly for manslaughter or *se defendendo*. *Tutius erratur ex parte mitiori*.

Burn. Tit. Jurors. sect. 51

(*d*) There have been however several instances, wherein it has been done, viz. *Mackally's case*, 9 Co. Rep. 70. a. *Mawgridge's case*, Hill. 5 Ann. B. R. Kel. 120.

Onchy's case. Trin. 13 Geo. B. R. all which were special verdicts, and the court ruled them to be murder.

[306]

C H A P. XLII.

Concerning the misdemeanors of jurors, and their punishment.

IF any of the jury eat or drink without license of the court before they have given up their verdict, they are fineable for it.

But tho it be not at the charges of either party, antiently it was held it would avoid the verdict. 24 E. 3. 24. a.

But at this day the law is settled, that it is only a misdemeanor fineable in them that do it, but avoids not the verdict. 14 H. 7. 29. b. (*a*). 20 H. 7. 3. a.

(*a*) *Vide plus de ceo case* 15 H. 7. 1. b.

But

But if it be at the charge, for the purpose, of the prisoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears by examination, the judge, before whom the verdict is so given, may record the special matter, and thereupon the verdict shall be set aside, and a new trial awarded. 14 H. 7. 30. a. b.

If a juryman before he be sworn take information of the case, this is cause of challenge, as the law stands at this day, but antiently it was held otherwise, and that it was lawful, and that was the reason given in the statute of 6 H. 6. cap. 2. which enacts, “ That pannels “ of assises be deliverd by the sheriff to either party six days before “ the sessions, namely, that they might inform the jurors of their right “ before the session.

But this brought great inconvenience in embracery and tampering with jurors, and therefore it is justly disused and disapproved.

If a juryman have a piece of evidence in his pocket, and after the jury sworn and gone together he sheweth it to them, this is a misdemeanour fineable in the jury, but it avoids not the verdict, tho the case appears upon examination. M. 23 Car. 1. [307] B. R. M. 40 & 41 Eliz. B. R. Croke, n. 1. Graves & Short (b); *vide tamen contra* 11 H. 4. 18. a.

But if after the jury sworn either party deliver a piece of evidence to the jury, and the verdict is given for him that deliverd it, it shall avoid the verdict, but then this must appear by examination, and be indorsed upon the *poslea* or verdict, so as it appears of record, and it must not be barely by affidavit made after. M. 40 & 41 Eliz. B. R. Graves & Short. Co. Lit. 227. b.

But if the verdict be given against him that deliverd the evidence, the verdict is good. *Ibid.*

If a piece of evidence under seal be read in court, the jury ought regularly to have it with them, but not if it be not under seal.

But yet if after the jury sworn a piece of evidence not under seal be by the court deliverd to the jury, it doth not avoid the verdict, and so it is, if it be deliverd by a mere stranger, or if it be deliverd by one of the parties, and the verdict be given against him, on whose behalf it was deliverd. M. 37 & 38 Eliz. B. R. Croke, n. 1. (c)

If after the jury sworn and gone from the bar they send for a witness to repeat his evidence, that he gave openly in court, who doth it

(b) Cro. Eliz. 616.

(c) Vicary & Farthing, Cro. Eliz. 411.

accordingly, this appearing by examination in court and indorsed upon the record or *postea* will avoid the verdict. *T. 32 Eliz. B. R. Croke, n. 17. Metcalfe & Deane (d). M. 20 Jac. B. R. Hillord & Hall (e)*, because not done openly in court, nor in the presence of the parties concerned. *M. 32 Eliz. B. R. Leon, n. 426. Elme's case (f)*.

But if the jury after their departure from the bar desire to hear the testimony of a witness again, they may be sent for into court, and the witness may be heard again openly, where the court or parties may ask what questions they think fit.

[308] If depositions are read in court to the jury, and after the jury sworn and going from the bar the solicitor or prosecutor for the king or party without consent of parties or order of the court deliver the copies of the depositions to the jury, if they find against him on whose part the copies were delivered, the verdict is good, but if they find for him on whose part they were delivered, and this appear by examination, and be (as it ought to be) indorsed upon the *postea* or record, the verdict shall be quashed, and a new *venire facias*, or award for a new jury shall be returned. *M. 20 Jac. B. R. Hillord and Hall.*

If after the evidence given, where divers evidences are read on both sides, and the clerk is making up his bundle of evidences, that were under seal, to deliver to the jury, the solicitor for the plaintiffs delivers a bundle of depositions to the jury, some whereof were read, and some not read, and upon examination this appeared, tho the jury swore they opened not the bundle delivered by the solicitor, yet the verdict for the plaintiff was for this cause avoided, (the matter being indorsed upon the record) and a new *venire facias* awarded, for great inconvenience may be by such a practice, and the oath of the jury, that never looked into them, was not regarded, for possibly it may be a misdemeanor in them to look into it, which they shall not excuse in this manner. *T. 1653. Webb & Taylor, 2 R. A. 714. pl. 6.*

If the party after the jury sworn speak with a jurymen, but nothing touching the business in issue, this doth not avoid the verdict given after for him. *M. 7. B. R. per curiam.*

But if he or any in his behalf say to a jurymen after his departure from the bar and before verdict given, the case is clear for the plain-

(d) Cro. Eliz. 189.

(e) 2 Rol. Rep. 261. Palm. 225.

(f) 1 Leon. 305.

tiff, this shall avoid the verdict, if given for the plaintiff, for it is new evidence. *H. 22 Jac. B. R. Athil & Bukver* adjudged. 2 *Rel. Abr.* 716. *pl.* 20.

If *A.* be challenged off, and twelve more sworn, yet *A.* goes along with the twelve sworn and is present at their consultation, if *A.* give no new evidence, nor advised or directed them to find that party, for whom the verdict is given, the verdict is good, [309] but *A.* shall be fined for his misdemeanor. *P. 17 Jac. B. R. Park's* case.

Now touching fining of jurors I shall add farther.

If a man, that is one of the indictors, be returned upon the petit jury, and do not challenge himself, he shall be fined. 40 *Affiz.* 10.

If a jury say they are agreed, and it being asked, who shall say for them, they say their foreman, but upon farther inquiry they are not agreed, the jury shall be fined, *viz.* every one apart. 40 *Affiz.* 10. 29 *Affiz.* 27.

If a jurymen be called and refuse to appear, or if having appeared withdraw himself before he be sworn, the court may set a fine upon him at their discretion: *vide Stat. 35 H. 8. cap. 6.*

So if he be challenged, and while the challenge is trying withdraw himself, and the challenge is upon the trial disallowd, and he be not present to be sworn 36 *H. 6. 27. a.* or being sworn withdraw himself from his fellows before the verdict given. 34 *E. 3. Office de court* 12.

If eleven of the jury be agreed, and the twelfth refuse, and make his companions lie by it, heretofore such jurymen hath been imprisoned for his wilfulness, 8 *Affiz.* 35. and fined, and the inquest taken by the other eleven jurors. 3 *E. 3. Verdict* 40.

But upon great consideration both these courses have been disallowd, and the judgment upon the verdict of eleven jurors reversed, and the jurymen (fined and imprisoned) discharged, as being contrary to law, for it may be the twelfth was in the right, yet howsoever his conscience is not in this manner to be forced, and therefore former precedents of this kind have been disallowd. 41 *E. 3. 11. a.* 41 *Affiz.* 11.

But what if a juror give a verdict against all reason, convicting or acquitting a person indicted against evidence, what shall be done? I say, if the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this

saive to reprove the person convict before judgment, and to acquaint the king, and certify for his pardon.

And as to an acquittal of a person against full evidence it is likewise certain the court may send them back again, and so in the former case, to consider better of it before they record the verdict, but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it, but may respite judgment upon the acquittal.

But as touching punishing the jury, I shall say, what I think may be done, and what may not be done.

1. I think in such a case the king may have an attain, for altho a man convicted upon an indictment can have no attain, because the guilt is affirmed by two inquests, the grand inquest, that presents the offense upon their oaths, and the petit jury, that agrees with them, yet where the petit jury acquits, they stand as a single verdict, for they disaffirm what the grand inquest of twelve men have upon their oaths presented, and with this agrees the book 10 *H.* 4. *Attain* 60, 64. *per Thorn.*

2. By the statute of 26 *H.* 8. *cap.* 4. the justiciar or steward, before whom any person is acquit of felony against pregnant evidence in *Wales* or the marches thereof, may bind over the jurors to appear before the president and council of the marches of *Wales*, who may, as they see cause, fine and imprison such jurors by their discretion.

3. I do confess in the king's bench there have been many precedents of jurors, that have acquitted persons of murder, or other felony tried in that court, if they have gone against pregnant evidence, that have been fined, imprisoned and bound to their good behaviour during their lives (*g*).

The like hath been done before justices in *Eyre*, and the court of king's bench is a court in *Eyre* and much more, for that court may reverse judgment given in *Eyre*. See for this purpose *T.* 43 *Eliz.* *B. R. Rot.* 979. *Noy's Rep.* p. 48 & 49. *Wharton's case*, where the jury in the king's bench acquitting the prisoner of murder against pregnant evidence, and finding it only manslaughter were fined 20*l.*

[311] apiece, bound to the good behaviour and for the good behaviour of the prisoner, and committed, and this was done by the advice of all the judges. See the same case *M.* 44 & 45 *Eliz.* *B. R. Yelv. Rep.* p. 23.

M. 42 & 43 Eliz. B. R. Croke, n. 12. p. 778. Wats & Braines.

In an appeal of murder there was a confederacy among the jury to bring in the verdict *not guilty*, and if the court disliked it, then to change their verdict, and accordingly they did, and the court disliking their verdict they went out and found him guilty, and this agreement being discovered, the principal confederates were fined and imprisoned, but this fine was for their confederacy and practice, not for their verdict.

7 *R. 2. Coron. 108.* The jury acquitted a notorious robber in the king's bench against great evidence, and the court bound the jury for the good behaviour of the prisoner; the reporter makes a *quære per quel ley*, vide the notes annexed to *Benloe 153.* to the same purpose.

4. Again, in cases of inquest of office there have been precedents in the *Exchequer*, and more frequent in the court of wards for fining of jurors, that would not find according to their evidence. *H. 28 Eliz. in Scaccario coram Theff. & baronibus. 3 Hughes 196.*

5. The practice of the king's bench to fine jurors for finding verdicts contrary to their evidence was endeavouring to be brought in practice before judges of *nisi prius*; and about 14 *Car. 2.* in an *Oxfordshire* case *Huntingdon* and his eleven companions jurors were fined 5*l.* apiece for such a verdict, and the fine estreated into the *Exchequer*, but by the whole court by the advice of the greater part of the rest of the judges process was stayed upon that estreat, as being imposed contrary to law (*h*).

6. Before justices of *oyer and terminer* and gaol-delivery, if the jury acquitted a felon contrary to their evidence, the use was to bind them over to appear in the king's bench to answer an information, but I never knew any preferd, and indeed it were impossible almost for any judge or jury to convict a jury upon such an account, because impossible, that all the circumstances of the case, that might move the jury to acquit a prisoner, could be brought in evidence; this therefore seems to me to be but *in terrorem*. [312]

7. But then it was endeavoured to bring the practice of the king's bench into use before justices of gaol-delivery and *oyer and terminer* to fine jurors in criminal causes for not observing the judges directions, and acquitting felons against their evidence, and accordingly a jury in *Gloucestershire* was fined 5*l.* a man for acquitting a person in-

(b) *Vide antea c. p. 22. p. 160. Vaugb. 145.*

dicted of burglary, the form of the fine was much the same as is hereafter mentiond, this fine was also estreated into the *Exchequer*, but all the court after great advice with the judges of the common pleas ordered a stay of process thereupon, as being neither warrantable by law nor antient precedents in any court less than *Eyre*.

At the gaol-delivery at *Newgate* 10 Maii 17 Car. 2. *Wagstaff* (i) and eleven other jurymen were fined five marks apiece for acquitting *Richard Tomson* and others indicted for conventicles, *Eo quòd ipsi juratores adtunc & ibidem eosdem Ricardum Tomson &c. de prædictâ transgressione & contemptu contra regem hujus regni Angliæ, & contra plenam evidentiam, & contra directionem curiæ in materiâ legis ibidem de & super præmissis eisdem juratoribus versùs præfatos Ricardum Tomson &c. in dictâ curiâ ibidem apertè dat' & declarat' de præmissis eis impositis in indictamento prædicto acquieverunt in contemptum dicti domini regis nunc legumque suarum, & ad magnam obstructionem & impedimentum justitiæ, necnon in malum exemplum omnium aliorum juratorum in consimili casu delinquentium.*

They were thereupon committed, and brought their *habeas corpus* in the court of common-bench, and all the judges of *England* were assembled to consider of the legality of this fine, and the imprisonment thereupon, wherein there was some little diversity of opinion, whether without a cause of suit returned also, the common pleas could give judgment touching this fine, and if there were cause, deliver the party, or whether he must go into the king's bench by *habeas corpus* and *certiorari*.

[313] But it was agreed by all the judges of *England*, (one only dissenting,) that this fine was not legally set upon the jury, for they are the judges of matters of fact, and altho it was inserted in the fine, that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impossible any matter of law could come in question, till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges.

And altho the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn

(i) In *Bussell's case*, *Vaugb.* 153.

was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.

And to say the truth, it were the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner, and if the judge's opinion must rule the matter of fact, the trial by jury would be useless.

Whereupon, and upon view of the precedents in the court of common bench, where prisoners not legally committed or fined had been discharged, tho no cause of privilege were returned, the jurors were discharged of their imprisonment.

And therefore, altho the long use of fining jurors in the king's bench in criminal causes may give possibly a jurisdiction to fine in these cases, yet it can by no means be extended to other courts of sessions of gaol-delivery, *oyer* and *terminer*, or of the peace, or other interior jurisdictions.

3 Wilfon, 172, 177:

C H A P. XLIII.

[314]

Concerning Banding mute, and the punishment of penance, or peine fort & dure. []*

I HAVE hitherto considered the pleas of the prisoner in capital causes, namely, 1. Confession. 2. Pleas in bar, and 3. Pleas to the felony, or *not guilty*.

And I have considered the proceedings in order to bring the party to his trial, and the trial thereupon by the jury.

It remains, that I should now come to consider what is to be done in case the prisoner will not answer, but stand mute and make no defense.

[*] But now by the statute 12 Geo. 3. c. 35. If any person being arraigned on any indictment or appeal of felony, or on any indictment for piracy, shall upon such arraignment stand mute, or will not answer directly to the felony or piracy, he shall be convicted of the offense, and the court shall thereupon award judgment and execution, in the same manner as if he had

been convicted by verdict or confession; and such judgment shall have all the same consequences, as a conviction by verdict or confession.

And the same law is, with respect to an arraignment for treason or petty larceny. See *Burn. Tit. Mat. 2 Inst. 177. 2 Hawk. P. C. 329:*

In this matter these things are considerable.

1. What shall be said in law a *standing mute*, and what not.
 2. What the consequence or penalty is of a standing mute in capital causes, and therein of *peine fort* and *dure*.
 3. What cautions are to be used before the inflicting of it.
 4. By what law it is introduced.
- I. As to the first of these.

If the prisoner hath received his judgement already, or be convicted and brought to the bar, and demanded what he can say, why judgement should not be given against him, if convicted, or why execution should not be awarded, and he saith nothing, yet this is not such a standing mute as is in hand, for he is already convicted or attaint: And therefore in such case, if the party so called hath always remained in custody from the time of his plea of *not guilty*, if he be called to shew what he can say, why he should not have judgment upon his conviction or execution upon his former judgment, [315] and he say nothing, it shall not be inquired, whether he can speak or not, but he shall not have present judgment or execution, as the case requires. 10 E. 4. 19. b. But if long time hath passed between his conviction or judgment and this second calling to the bar, it is prudent to make the inquiry, at least by witnesses, whether he can speak, for possibly he may have a pardon to plead.

But if a man abjure or be outlawd of felony, and after return again, and be taken and brought to the bar to shew cause why execution should not be done, if he stand mute, an inquest of office is to be taken by the court to inquire, whether he can speak or not, and if it be found, that by visitation of God since his abjuration, &c. he hath lost his speech, it shall be also inquired, whether it be the same person containd in the record of outlawry or abjuration, before judgment or execution (as the case requires), shall be awarded against him, for he may plead in bar of execution in such case, that he is not the same person. 10 E. 4. 19. b. 8 H. 4. 1. b. And so it seems to be, if he were brought in upon a *capias utlegat'* or *habeas corpus* by the sheriff; *de quo infra*.

And therefore the book of 26 Affiz. 19. that saith a party abjured standing mute shall have *peine fort & dure* is mistaken, for he shall be hanged, if he stand mute of malice. *Stamf. P. C. Lib. II. cap. 60. fol. 150. b.*

If a man indicted of felony demur to the indictment, and will not otherwise answer, this is no standing mute, but if the demurrer be ruled against him, he shall have judgment of death. 14 E. 4. 7. a. *per cur.*

If a man indicted or appealed of felony pleads *not guilty*, and puts himself upon the country, and the jury remains upon challenges till another day and then appears, and the prisoner at the bar will say nothing but stand mute, yet this is not a standing mute, for the inquest shall be taken upon the issue already joined; and so in an appeal. 15 E. 4. 33. b.

And yet even in that case it is possible the prisoner may be taken dumb between his plea and his trial, and so lose some advantages, that the law gives him for his defense, as challenges, [316] examination of witnesses and many matters for his defense; [therefore] the court hath used sometimes by inquest, sometimes by inquiry *ex officio* by the inquest impannelled to try his issue to inquire, whether he stand mute of malice, and then to try him, or if it be *ex visitatione Dei*, then to respite his trial, but if he spoke the same day in the hearing of the court, then such inquest of office is not taken, for the court is of their own knowledge ascertained of his ability to speak. 43 Affiz. 30. 8 H. 4. 1 & 2.

The standing mute of a prisoner is not, where he hath pleaded *not guilty* and put himself upon the country, tho afterwards he would retract it.

If a prisoner for felony plead *not guilty* and put himself upon the country, and when the jury appears he challengeth peremptorily above thirty-five, in such case the jury was not to be taken, but judgment of penance was antiently given against him, and so it was no attainder in case of felony. 17 Affiz. 6. 17 E. 3. 23. a. 14 E. 4. 7. a. 3 H. 7. 12. a. 2. a.

But the law herein was after declared otherwise, and by the advice of all the judges judgment of death shall be given, and so it was an attainder. 3 H. 7. 12. a. where it was settled for a rule in all circuits, and so it continued until 22 H. 8. cap. 14. when by act of parliament the challenge was reduced to twenty, and so the judgment of death upon peremptory challenge ceased, unless in high treason or petit treason, where it stands on foot as before, *vide Co. P. C. cap. 102. p. 227, 228.* who seems to hold, that for challenging above thirty-

thirty-five judgment of *peine fort & dure* shall be given according to 14 E. 4. 7. a. & 3 H. 7. 2. a. *per omnes iusticiarios contra Keble.*

Regularly therefore a man is said to stand mute, when being arraigned for felony or treason, either 1. He answers not at all, or 2. If he answers with such matter, as is not allowable for answer, and will not answer otherwise, or 3. Where he pleads *not guilty*, but when demanded how he will be tried, either will say nothing, or not put himself upon the country.

[317] If he stand mute and say nothing at all, in case of felony the court ought *ex officio* to impanel a jury and swear it as an inquest of office to inquire, whether he stand mute of malice, and if found so, he shall have the judgment of *peine fort & dure*, or whether it be *ex visitatione Dei*, and if found so, they are to inquire touching all those points, which he might possibly plead for himself, as whether a felony were done, whether he be the same person, that is indicted for it, whether he did it, and whether he hath any matter to alledge for his discharge.

But what if all this be found against the prisoner, what shall be done? whether judgment of death shall be given against him, tho he never pleaded, seems yet undetermined (a).

If a man plead *not guilty*, and being demanded how he will be tried answers by God and holy church 4 E. 4. 11. a. or delivers in a protection 7 E. 4. 29. a. *Coron.* 30. or will not put himself upon trial of his country, this is a standing mute, as much as if he had not at all pleaded.

II. As to the consequences of standing mute.

In case of an indictment of high treason, the party standing mute, judgment of high treason shall be given against him as upon a *nihil dicit*, M. 3 & 4 Eliz. Dy. 205. a. rule accordant. *Stamf. P. C. Lib.* II. cap. 60. fol. 150. a. 2 Co. *Inst. super stat' Westm'* 1 cap. 12. vide *infra*, cap. 44.

In an appeal antiently it had been held, that if the prisoner stands mute, judgment should be given for the appellant. 21 E. 3. 18. a. (*).

But afterwards the law was held all one in case of an appeal and of an indictment, namely the defendant standing mute judgment of *peine fort & dure* was given against him, and the statute of *Westm'* 1. cap.

(a) Vide B. *Corone* 217. where a person, who could neither speak nor hear, was arraigned for felony; vide Part I. p. 34. in note.

(*) See *State Tr.* Vol. I. p. 367. lord Audley's case.

12. speaks only of the king's suit, (†) *vide* 43 *Affiz.* 30. 3 *H.* 7. 2. *a.* 14 *E.* 4. 7. *a.*

If a man be indicted of felony and stands mute, he shall be put to penance, *T.* 18 *E.* 2. *B. R. Rot.* 20. *in dorso*, *Berks. rex* (b). And yet *vide* *H.* 18 *E.* 3. *B. R. Rot.* 16. *Ebor. rex, Petrus* [318] *Geildhird* arraigned (c) *pro deprædatione in regia viâ* stood mute, and an inquest of office being charged to inquire, if it were wilful, and found so, he had judgment to be hanged.

On the other side *T.* 30 *E.* 3 *Rot.* 11. *in dorso* *Hunt. rex*, The bishop of *Ely* arraigned for felony *dicit, quod ipse est membrum sanctæ ecclesiæ, & episcopus unctus, & frater domini Papæ*, and that he could not answer without the archbishop of *Canterbury* [his ordinary] *coram laico iudice*; there went out thereupon a writ to the sheriff of *Hunt.* to return twenty-four to inquire of the whole fact, and by the inquest he was found guilty of the felony charged upon him, [*de receptamento felonum*] and his goods seised, but he was demanded by the archbishop of *Cant.* and delivered to him as a member of holy church, so that there the fact was inquired of, tho the bishop refused to answer, which was a kind of standing mute (d).

By the statute of 33 *H.* 8. *cap.* 12. any person arraigned before the lord steward for treason, murder, manslaughter, or blood-shed in the king's palace, and standing mute shall have judgment, as if convicted so there is no penance in that case.

But upon the statute of 28 *H.* 8. *cap.* 15. for commissioners of the admiralty proceeding in maritime felonies, &c. there is no such exclusive provision, and therefore they follow herein the [319]

(†) 2 *Co. Inst.* 178.

(b) This was the case of *Stephen de Forrester*, who was indicted before justices of *oyer and terminer pro receptamento felonum*, and upon being arraigned *mutum se tenet*, a jury was impanelled *ex officio*, who found *quod mutum se tenet de merâ & spontanea voluntate sua, & quod loqui potest si velit*, and he was thereupon put to penance, *ad paenitentiam*; the record was removed by writ of error *coram rege*, where he pleaded *not guilty*, and was committed to the marshall and afterwards produced the king's pardon, *Iles inde quitus*.

(c) It appears by the record, that it was not upon arraignment, that he stood mute, for he had fled from justice and was outlawed, but being afterwards taken he was brought into court, and demanded why execution should not be done upon him in

pursuance of the outlawry, to this he made no answer; but this is not a standing mute to the purpose in hand, as our author himself hath shewn at the beginning of this chapter.

(d) This was not properly a standing mute, but a claiming the benefit of clergy, (which in antient times was usually done before pleading,) and was of the like nature with the case of *Alan de Beckingham Mich.* 20 & 21 *Edw.* 1 *Rot.* 4. *in dorso* *coram rege*, *Nottingham*, see *Part* 1. p. 343. *in notis*, and the case of *Jorn de Bosco*, *P.* 6 *E.* 2. *B. R. Rot.* 2. *Fflox*, see *Part* 1. p. 180. *in notis*, the reason therefore, why the fact was inquired of, was the same in this case, as in those, *viz.* that it might be known *pro quasi ordinario liberari debeat*, whether as a clerk convict or acquit. *Vide* 2 *Co. Inst.* p. 633.

course

course of the common law, so that any person indicted for piracy before these commissioners standing mute shall have judgment of *peine fort & dure*. *T. 7. Eliz. Dy. 241. b. Brooke's case.*

The judgment of *peine fort & dure* is, as it is recited by *Stamf. P. C. Lib. II. cap. 60. fol. 150. b. & 4 E. 4. 11 b. viz.* "That he be sent to the prison from whence he came, and put into a dark, lower room, and there to be laid naked upon the bare ground upon his back without any clothes or rushes under him or to cover him except his privy members, his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron, as he can bear, and more. And the first day he shall have three morsels of barley bread without drink, the second day he shall have three draughts of water, of standing water next the door of the prison, without bread, and this to be his diet till he die" (*e*). *Vide the entry thereof Rast. Entries 385. a.*

This judgment is given for his contempt in refusing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives any escheat or corruption of blood: *vide 34 E. 3. Escheat 10. Dy. 308. a. 14 E. 4. 7. a.*

The severity of the judgment is to bring men to put themselves upon their legal trial, and tho sometimes it hath been given and executed, yet for the most part men bethink themselves and plead.

If a peer of the realm arraigned upon an indictment of felony before his peers refuses to plead, [he shall have] this judgment of *peine fort & dure*. *P. 17 Car. 1. casus domini Castlehaven. (f).*

And a woman shall have the same judgment if she stands mute. *2 Co. Inst. 177. super stat. Westm' 1. cap. 12. Wiseman's case there cited.*

[320] If a man be indicted of petit larceny and refuses to plead, it seems judgment of *peine fort & dure* shall not be given, but the party convicted, for he is not to have judgment of death.

But if a woman be indicted for simple larceny of goods under 10s. tho she shall not die for it, but only be burnt in the hand by the statute of 21 Jac. cap. 6. yet if she refuses to plead, the judgment of *peine fort & dure* shall be given against her, because it may fall out upon the case, that she hath been burnt in the hand before, and then she is to be executed; and it is but a privilege, as clergy is, which she must put herself by her defense into a capacity of enjoying.

(*e*) But before they proceed to this extremity, it has been the practice to endeavour to make the prisoner plead by tying

his thumbs together with whip cord. *Thorely's case Kel. 27.*

(*f*) *State Tr. Vol. I. p. 367.*

If a new felony be made by act of parliament, tho it makes no provision touching the penalty of standing mute, yet it is a necessary consequence thereof, tho not specially provided for, if it be not ousted by the act, that makes it felony; as clergy is an incident to every new created felony, unless specially ousted by act of parliament (*), for they are incidents: *vide Dy. 241. b.*

And therefore in rape, tho made felony by *Westm' 2. cap. 34.* if the party indicted stand mute, he shall have judgment of penance. *P. 7 Car. 1. lord Castlehaven's case.*

Tho judgment be given of *peine fort & dure*, yet if the offense laid in the indictment be within clergy, his clergy shall be allowed him, which appears by the statutes of 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* and other statutes that oust clergy, where the party stands mute, in some particular cases, and by the books.

III. As for the third general, the necessary cautions to be used in inflicting this severe punishment are these.

1. Let not the judgment be too hastily given, let the prisoner have not only *trina admonitio*, but also some convenient respite, possibly till the afternoon, to bethink himself, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and let the judgment itself be distinctly read to him, that he may know his danger before his final refusal with due admonition [321] not to destroy himself. 4 *E. 4. 11. b.*

2. Before any judgment final be given, if the prisoner stands wholly mute and says nothing at all, let an inquest of office be taken to inquire, whether it be *ex malitia*, or *ex visitatione Dei*, unless he hath spoken in court the same day, *vide Rast. Entries* title *gaol-delivery*.

3. And likewise let the judge hear the witnesses upon oath to give a probable testimony of his guilt, for tho his malicious silence carries with it a presumption of guilt, yet it is good to have some concurrent testimony. 1. In respect of the severity of the judgment. 2. Because the statute of *Westm' 1. cap. 12. de quo infra*, seems to require it.

4. If the offense laid in the indictment be within clergy, tho in strictness of law the prisoner ought to pray it, yet it is the duty of the judge to allow it, tho not prayed, and that as well after judgment pronounced as before.

IV. Concerning the fourth particular, by what law this judgment of *peine fort & dure* is introduced.

(*) *Vide Part I. p. 704.*

By the statute of *Westm'* 1. cap. 12. *Purvieu est ensement que les felons escries, & queux sont apertement de male fame, & ne soy voilent mitter en enquest de felonies, que homes met sur eux devant justices a la suit le roy soient mises en la prison fort & dure, come ceux queux refusent estre al common ley de la terre, mes ceo nest my a entendre pur prisoners, que sont prises per legier suspicion.*

Some (*h*) have antiently thought, that this act of parliament introduced the penance, and therefore they did antiently think it did not extend to an appeal, because that is the suit of the party and not the suit of the king, *de quo antea* p. 317.

But it seems, that altho this statute is in some points directive, namely, that it should be applied to those, that are of ill fame, and not those, who are taken upon a light suspicion, and therefore the court before they give this judgment ought either by inquest of office, or at least by examination of witnesses to inquire concerning the probabilities of the guilt: *vide Stamf. P. C. Lib. II. cap. 60. fol.*

[322] 150. *a.* yet this statute doth not originally introduce the penance, but it was to be done by the common law, and accordingly it is agreed by my lord *Coke* in his comment upon this statute 2 *Inst.* p. 179.

And this appears 1. Because this statute only speaks of imprisonment *fort & dure*, but enacts not the punishment itself by this lingering painful death, therefore the punishment, as it is thus inflicted, was at common law, and is by force of the common law. 2. Because tho some antient opinions were, that it extended not to the case of an appeal of felony, yet the law hath constantly for many ages extended it to an appeal (*i*), which cannot be by force of this statute, but by the common law.

3. The antients, as *Flota* (*k*), *Britton* (*l*) and *Horn* (*m*), tho they wrote since the making of this statute, mention the penance without referring of it to this act of *Westm'* 1. (*n*).

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(*b*) *Stamf. P. C. 149. b. Poulton de pace regis* 211. *b.*

(*i*) *Kel.* 37:

(*k*) *Lib. I. cap. 34. § 33.*

(*l*) *Cap. 4. § 23. & cap. 22. § 73.*

(*m*) *Mirror, cap. 1. § 9.*

(*n*) This statute was made 3 *E. 1.* and tho by the manner of the expression it does not seem to have introduced this penance, but rather speaks of it as a thing already known, yet I cannot find, that it is ever

taken notice of in any antient author, book, case, or record before the reign of *E. 1.* on the contrary I find some instances in the preceding reign of persons arraigned for felony standing mute, who yet were not put to their penance, but had judgment to be hanged: at which time it seems to have been the usual practice, that if the prisoner stood wilfully mute, a jury of twelve were impannelled *ex officio*, and if they found him guilty, another jury of twenty

C H A P. XLIV.

Concerning clergy how it stood at common law, and how generally at this day.

HAVING in the former chapter gone through the pleas and trials of the prisoners, and the proceeding upon standing mute, I come to consider the *privilegium clericale*, and I the rather refer it to be examined in this place, because tho antiently clergy was prayed and allowed upon the arraignment of the prisoner, yet at this day it is rarely done but upon his conviction or standing mute, and this is, 1. For the convenience of the court to be ascertained first of the nature of the crime by the confession or trial of the prisoner. 2. For the advantage of the prisoner, who possibly may be acquitted, and so need not the benefit of clergy: *vide Hob. Rep.* 288. *Searle & Williams.*

And for the full discussion of this matter, (which I must needs say is one of the most involved and troublesome titles in the law,) I shall, as near as I can, hold this method. 1. To consider somewhat in general touching the original and alteration of the privilege of clergy. 2. In what cases it is to be allowed, and in what not (*a*). 3. What persons are capable of this privilege, and what not (*b*). 4. At what time it is to be allowed, and when not (*c*). 5. The manner how it is to be allowed, and who the judge of it (*d*). 6. The consequence of the praying or allowing of it (*e*).

twenty-four were chosen to examine the verdict of the former; and if they were of the same opinion, the prisoner was sentenced to be hanged. *Placita coronæ coram iustis itinerantibus in comitatū Warwickensi anno 5 H. 3. Rot. 1.*

“*2 nos, quæ fuit uxor Roberti de Buseo, appellat Thomam filium Huius de morte Roberti viri sui, & Thomæ venit, & quia ipsa habet virum Robertum de Verdun nomine, qui nullum facit appellum, ipsa non habet vocem appellandi, & ideo inquiratur veritas per patriam, & Thomas detendit mortem, sed non vult ponere se super patriam, & xii juratores dicunt, quod culpabilis est de morte illâ, & xxv milites, alii a prædictis xii, ad hoc electi idem dicunt, & ideo suspendatur.*

Catalla Thomæ xxxiv. solidos & vi denarios, unde vicecomes respondebit.

Ibidem in drfo. “*Thomas de la Hethe captus per indictmentum pro furtis & aliis nequitiiis & pro receptamento venit, & non vult ponere se super patriam; & juratores dicunt super sacramentum suum, quod malè credunt eum de receptamento. Hobb. Gloughby, qui fuit latro cognitus, & postea suspensus apud Caunpeshem, & de hoc & de aliis furtis eum malè credunt, & xxiv milites ad hoc electi dicunt idem, quod prædicti xii juratores, & quod latro est de ovibus & de averiis & aliis rebus, & ideo suspendatur.*

(*a*) *Cap.* 45. 46, 47, 48, 49, 50.

(*b*) *Cap.* 51.

(*c*) *Cap.* 52.

(*d*) *Cap.* 53.

(*e*) *Cap.* 54.

For the first of these, namely the original and progress of this *privilegium clericale*.

Antiently princes and states converted to christianity in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions, principally of two kinds. 1. Exemption of places consecrated to religious duties [324] from arrests of crimes, which was the original of sanctuaries. 2. Exemption of their persons from criminal proceedings in some cases capital before secular judges, which was the true original of the *privilegium clericale*.

The clergy increasing in wealth, power, honour, number and interest, afterwards set up for themselves, and that, which they obtained by the favour of princes and states at first, they now began to claim as their right, and a right of the highest nature, namely *jure divino*; and by their canons and constitutions endeavoured, and (where they met with tame and easy princes and states,) obtained vast extensions of these exemptions. 1. In the person concerned, namely to all that had any kind of subordinate ministration relative to the church. 2. In the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from *Christ*, and from the pope shed abroad into all subordinate and ecclesiastical jurisdictions, whether ordinary or delegate.

And by this means they endeavoured and in some kingdoms and for some ages obtained, that there was a double supreme power, or two kingdoms in every kingdom, the one a *regnum ecclesiasticum*, absolute and independant upon any but the pope over ecclesiastical men and causes, exempt and separate from the secular magistrature; the other a *regnum seculare* of the king or civil magistrate, which yet was not so absolute, but that it had subordination and subjection to this *regnum ecclesiasticum*; so it was *regnum sub graviore regno*.

He that lists to see the whole scheme of their claim, let him read *Suarez* his large discourse of the *monumenta ecclesiastica* in his *opuscula*.

But altho the usurpations of the pope were very great and obtained much in this kingdom, until the extermination of his pretended supremacy by king *H. 8.* yet this claim of the exemption of the clergy totally

totally from secular jurisdiction grew so burdensome and intolerable, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contray usage of the kingdom; for ecclesiastical canons never bound in *England* farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted. And therefore,

I. As to the exemption of the clergy from civil suits between party and party only, if upon the *distingas* he was returned *clericus & beneficiatus non habens laicum feudum*, process issued to the bishop to bring him in, and in case of a statute merchant they were by special acts exempted from arrests by *capias*. But yet they were not exempt from the jurisdiction of civil courts in civil causes, yet antiently they attempted this also in the king's courts but with ill success, and so they never attempted it after, that I remember.

M. 7 & 8 E. 1. B. R. Rot. 13. Cant. William Joye plaintiff [brought an action] against *Guy Mortimer* rector of *Kingston* for beating him and cutting off his upper lip with a knife, the defendant pleaded *quod ipse est clericus, & non debet hic respondere*, and that was all the answer he would give, *Et quia querela ista non tangit vitam & membrum, sed est de quâdam transgressione personali, nec ipse vult in curiâ domini regis respondere ad querelam istam*, judgment was given for the plaintiff to recover 100*l.* damages taxed by the court, and [the defendant was] committed to gaol, and afterwards paid twenty marks to the king for a fine (o).

II. If they were indicted in cases criminal but not capital, nor wherein they were to lose life or limb, there *privilegium clericale* was

(o) The record of that case was thus, "*Wilhelmus Jene de Kyngeston queritur de Guydene de mortuo mari, rectore ecclesie de Kyngeston, & Thomâ l. Clerk de Harrington de hoc, quod Thomas simul cum aliis ex præcepto prædicti Guideris ipsum Wilhelmum insultaverant, verberaverunt, & male tractaverunt, ita quod de vitâ ipsius desperabatur: & dictus Guyde manû suâ propriâ, & knypulo suo labium ipsius Wilhelmi superius abscidit, unde dicit quod deterioratus est & dampnum habet ad valentiam centum librarum; & inde producit sectam. Et prædicti Guydo & Thomas veniunt & dicunt, quod clerici sunt, & non debent hic re-*

spondere, & sæpius quæsti si velint respondere, semper dicunt quod clerici sunt, & sine ordinarius suis nolunt respondere. Et quia querela ista non tangit vitam & membrum, sed est de quâdam transgressione personali, nec ipsi volunt in curiâ domini regis respondere ad querelam istam, consideratum est, quod prædicti Guydo & Thomas de prædictâ transgressione convincantur, & satisfaciunt prædicto Wilhelmo Jeye de dampnis, scilicet quilibet eorum de centum libris, & domino regi de misericordiâ, & committantur gaolæ pro transgressione &c.

not allowd them, and therefore not in indictments of trespass, petty larceny, or killing *se defendendo*. *Stamf. P. C. fol. 124. a.*

III. If they were not indicted of high treason, clergy was not allowable, and therefore *Hill, 2 H. 4. Rot. 4. B. R. rex*, where the bishop of *Carlisle* was indicted of high treason, and insisted upon his *privilegium clericale, quia episcopus unctus*, yet this claim was disallowd and he put upon his trial, and convicted (*p*).

Yet *Hill. 17 E. 2. Rot. 87. in dorso, Heref. coram rege*, the bishop of *Hereford* indicted of high treason for levying war against the king alleged, that he was *episcopus Heref. ad voluntatem Dei & summi pontificis*, and could not answer *absque offensâ divinâ & sanctæ ecclesiæ*. Thereupon the plea was adjourned into parliament, where the bishop answered as before, and the archbishop of *Canterbury* claimed him and had him; thereupon it was ordered, that day should be given in the king's bench to the bishop, and the archbishop was to have him there at the day, and in the mean time a writ issued to the sheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, [*quodd venire faciat tot & tales, &c. ad inquirendum prout moris est, &c. pro quali, &c.*] returnable at the same day; the bishop appeared accord-

[327] ingly in the custody of the archbishop, and the jury found him guilty, *Ideo considerat' est, quodd prædictus episcopus tanquam convictus &c. remaneat penes prædictum archiepiscopum ut prius, &c.* and all his goods and chattels, lands and tenements were seised into the king's hands by writ directed to the sheriff: Upon which it is observable, 1. That a kind of allowance is made of clergy in high treason. 2. That notwithstanding his claim of clergy, yet a writ issued to summon a jury, who inquired whether guilty or not. 3. That upon this plea and this inquisition, tho he had his clergy, it was *ut clericus convictus*.

Nota in the parliament of the 1 *E. 3.* this judgment was reversed for this cause, that the justices took the inquisition, *licet idem episcopus in aliquam inquisitionem se non posuisset. Claus. 1 E. 3. Part I. M. 13.* so that the judgment was given upon the inquisi-

(*p*) The treason given in the record is in these words, "Quicumque ligens domini regis, cujuscunque status, seu conditionis, spiritualis, vel temporalis fuerit, in terrâ *Angliæ* pro altâ proditione & crimine læsæ majestatis indictatus est, & coram rege, vel iudicialiis suis inde arrestatus tenetur, & debet per legem

Angliæ inde respondere.

Yet in ancient times a difference was made between treasons, that were immediately against the king's person, and other treasons; vide *Part I. p. 185, 186. 222.* in notes; and the case of the bishop of *Hereford* here mentiond.

tion, and not upon *nilhil dicit* for standing mute, and therefore erroneous (*q*).

But afterwards *T. 21 E. 3. Rot. 23. Hertford, rex, John Gerberge*, was indicted for a constructive treason namely, accroaching royal power, *de quo vide supra, Part I. cap. 11. p. 80. 138.* and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujusmodi casu seditionis secundum legem & consuetudinem regni hætenus obtentas & usitatas non est allocandum &c. quæsitum est ab eo sepius qualiter se velit acquietare*, he still replied, that he was a clerk, *asserens se nolle aliam responsionem exhibere*; and thereupon he [328] is committed to the marshal *ad pænitentiam suam secundum legem & consuetudinem regni subiturum &c.*

Nota clergy denied in such a treason, yet penance awarded, tho the charge was treason.

Yet at common law before the statute of *25 E. 3. cap. 4. pro clero*, it seems that clergy was allowable to him that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy 1.* But that is altered by the statute of *25 E. 3. pro clero.*

IV. If clerks were indicted with these clauses *insidiatores viarum & depopulatores agrorum*, clergy was denied them, and therefore the act of *4 H. 4. cap. 2.* was made to put these clauses out of indictments and to allow clergy, if they were in the indictment.

Again, as it was denied in respect of some offenses, so this *privilegium clericale* was by the common law abridged in respect of the person; for certainly by the canon laws Nuns had the exemption from

(*q*) The error of this judgment consisted not merely in its being given upon an inquisition "in quam episcopus se non posuisset," but because it was given upon an inquest, "in quam episcopus se non posuisset," after he had been allowed his clergy and delivered to his ordinary. For the *Placita Coronæ* of those times shew, that it was the constant practice of inquests *ex officio* to pass upon clerks pleading their *privilegium clericale*, where clergy was allowable the method whereof was thus. The clerk upon his arraignment pleaded his *privilegium clericale*; then came the ordinary and demanded him; then a jury *ex officio* was summoned to inquire into the truth of the charge; or as it is express in this record, "ad inquirendum, prout moris est, pro quali, &c. (i. e. pro quali eadem ordinario liberari debeat,)" and according to such inquest, the clerk was delivered to the ordinary as acquit, or con-

viict. Thus are the entries upon the rolls, "A. B. indictatus de feloniam, eo quod, &c. & ductus coram rege, & allocutus qualiter se velit de feloniam prædictam acquietare, dicit quod clericus est, & sine ordinario suo non debet hic respondere. Et super hoc venit C. D. &c. Et petit ipsum tanquam clericum sibi liberari; sed ut sciatur pro quali eadem ordinario liberari debeat, inquiratur rei veritas per patriam." Then a jury *ex officio* was summoned, by which if it was found, "Quod A. B. non est culpabilis, liberatur ordinario pro tali &c." But if culpabilis "liberatur ordinario tanquam clericus convictus, salvo custodiendus, sub pænâ quâ decet &c." *Vide M. 20 & 21 E. 1. Rot. 4. in verso, B. R. Hill. 22 E. 1. Rot. 15. Ibid. Trin. 30 E. 3. Rot. 11. B. R. Rex. Trin. 31 E. 3. Rot. 15. Ibid. Rex.*

temporal jurisdiction, but the privilege of clergy was never allowed them by our law: *vide stat' 21 Jac. (r)*.

Again, tho the ordinary took himself to be the judge of the allowance of the clergy and of the purgation of the clerk, yet the king's courts took that courage to make the ordinary but a minister, and themselves judges of the allowance and disallowance of the clergy and purgation. 21 E. 4. 21. b. 9 E. 4. 28. a.

And so the judges of the common law would oftentimes deliver the clerk to the ordinary, but *absque purgatione*, as where the clerk is attaint by outlawry or by judgment, or convict by his own confession, or upon an appeal. *Stamf. P. C. Lib. II. cap. 49. 3 H. 7. 12. a. 10 E. 3. Coron. 247. Hob. Rep. 288. Searle & Williams*, or if he were a notorious malefactor, *vide 10 E. 3. Corrn. 247.* or if he be convict by verdict of counterfeiting the seal or coin at common law before the statute of 25 E. 3. *Lib. Parl. 18 E. 1. Berton's case* (*), or if he be committed by record to the ordinary *absque purgatione. Hob. ubi supra.*

And in these cases, if the ordinary admitted him to his purgation, he was fineable for it as a great misdemeanor, and the party deliverd by such purgation shall be again committed to prison, *M. 34 & 35 E. 1 Rot. 59. Kanc. B. R. the case of Hugh Forsham deliverd by William Testa*, and another commissioned from the pope (s); and the entry in such cases is, *liberatur ordinario tanquam clericus convictus & utlegatus ad salvò custodiend' periculo, quòd incumbit &c. & inhibiturum est eidem ordinario, nè ad aliquam purgationem ipsius A. B. procedat domino rege inconsulto, eò quòd prædictus A. B. pro felonis &c. utlegatus est &c. H. 14 E. 3. B. R. Rot. 19. Rex. Suff. Lond.* The case of *John de Hemmyngeston* chaplain. But indeed, if the clerk had had his clergy and were generally deliverd to the ordinary, he might

(r) Cap. 28. §. 6 & 7.

(*) *Ryley's Plac. Parl. p. 56.*

(s) That case was thus: Whilst the temporalities of the archbishop of *Canterbury*, were in the king's hands, two clerks convict of felony imprisond in the archbishop's prison had been admitted to purgation, and deliverd out of custody by master *Hugh Forsham*, "Per mandatum magistorum *Willielmi Testa*, & *Gerald*, clericorum papæ, administatorum spiritualitatis archiepiscopatus prædicti, absque mandato domini rogis." *Forsham* was brought *coram rege*, and arraigned for the said offense; and the keeper of the

gaol was also arraigned for bringing the said clerks "coram prælato *Hugone* ad purgandum, absque præcepto domini regis;" and were both convicted by their own confession, and committed to the marshal, "Et postea finem fecerunt pro transgressione & contemptu prædictis." Afterwards the two clerks, who had been deliverd by such purgation, were brought from the tower, where they had been imprisond by the king's writ. "Et separatim allocuti qualiter de felonis prædictis se velint acquietare, dicunt quod clerici sunt, & liberantur ordinario sub pœnâ, quâ decet, &c.

admit him to make his purgation, and upon signification thereof by the ordinary into the chancery a writ should issue to the sheriff to deliver unto the party so purged all his goods and chattels seized into the king's hands upon that occasion, *nisi fugam fecerit eâ occasione*. *F. N. B.* 66. a And all this is to shew, that whatsoever weight the clergymen laid upon their canons and their exemptions from the secular jurisdictions, yet their canons or constitutions, or pretensions or claims of this kind were not binding here, nor so taken farther than either by acts of parliament or the common acceptance of the kingdom they were received, and therefore these privileges received divers alterations and corrections and restrictions by [330] the temporal judges, as the occasion required.

2 Hawk. P. C. ch. 33 per totum. 4 Blackf. Com. ch. 28. per tot. See Index to Foster. Tit. Clergy. Burn. Title Clergy. f. 2. Benefit of Clergy. 3. Peere Williams, 439—504.

C H A P. XLV.

In what offenses clergy is allowable or not.

NOW touching the offenses, wherein clergy is or was allowable, and in what not.

There are these general rules, that have influence in this whole discourse.

1. That in case of high treason against the king clergy was never allowable in this kingdom.

2. That at common law in all cases of felony or petit treason clergy was allowable, excepting two.

3. That where a statute makes a new felony, clergy is incident thereunto, unless it be specially taken away by acts of parliament; but where it makes a new treason, there is no clergy.

Upon these generals much of the succeeding business of this chapter, and some that follow will be built.

I. As to the first of these I say generally in all cases of high treason clergy was never allowed.

And this proposition will be considered two ways. 1. How the common law stood before the statute of 25 E. 3. *pro clero*, and 2. How it stood after.

The statute of 25 E. 3. *for the clergy* was made in the parliament held in *Hill*. 25 E. 3. which was in the same parliament, wherein the statute of declaration of treason is made, commonly called the *The statute of purveyance*.

By this statute *pro clero cap.* 4. it is enacted, " That all manner of
 [33¹] " clerks, as well secular as religious, which shall be from
 " henceforth convict before secular judges for any treasons
 " or felonies touching other persons than the king himself or his
 " royal majesty, shall from henceforth have and enjoy the privilege
 " of holy church, and shall be without impeachment or delay de-
 " liverd to the ordinaries demanding them, and upon this the arch-
 " bishop promifeth, that upon the punishment and safe keeping of
 " such clerks offenders, which shall be deliverd to the ordinaries, he
 " shall thereof make a convenient ordinance, whereby they shall be
 " safely kept and duly punished, so that no clerk shall take courage
 " to offend for default of correction.

At the same parliament it was declared what was treason, and among the rest counterfeiting the great or privy seal, or the king's coin is declared treason, and put in the same rank with compassing the king's death or levying of war, and it is thereby enacted, " That no
 " other offenses, than what are therein declared, be treason till de-
 " clared by parliament.

Before this statute there were two sorts of treasons, that concerned the king, one was of a greater note, and another of a less note.

Those of the greater note were *conspiring the king's death, levying of war against the king, adhering to his enemies*, and two others, that are since abrogated by the statute of 25 E. 3. which came under the general and obscure names of *sedition*, and *accroaching of royal power*.

In any of these a party convict had not his clergy at common law, this appears by the judgment cited in the former chapter (*a*). *T. 21 E. 3. B. R. Rot. 23. Rex.*

But there were other treasons, that concerned the king, which were of an inferior note, namely *counterfeiting the seal and counterfeiting the coin* and these, (the latter especially,) had only judgment as in case of petit treason, namely to be drawn and hanged.

And it seems before the statute of 25 E. 3. *de prodicionibus* clergy was allowd in both cases, as appears by the old book of *E. 3. B. R.*

(*a*) p. 327. Gerberge's case.

title *Clergy, placito ultimo*, and the judgment in parliament of 13 E. 1. in *Berton's* case, who being convict for counterfeiting the king's seal had his clergy, but *tradatur ordinario sine purgatione* (b).

But now as to the statute of 25 E. 3. *pro clero*, and the statute of 25 E. 3. at the same parliament *de prodicionibus* laying them both together in all cases of treason touching the king himself or his royal majesty clergy is wholly taken away, and in all other cases of treason or felony clergy is allowd; and consequently in murder, robbery, petit treason clergy is settled by this act of parliament.

But whatsoever is declared treason against the king by the statute of 25 E. 3. *de prodicionibus*, as well counterfeiting the seal or the money of the kingdom, as any other treason therein declared, is wholly exempted from clergy. 19 H. 6. 47. b. *Stamf. P. C. Lib. II. cap. 42. fol. 124. a. M. 31 E. 3. coram rege Rot. 18. Rex, in dorso, Bucks, casus abbatis de Mussenden* (c) *pro rescacatione & falsificatione legalis monete*, 24 H. 8. *Spelman's Rep. accordant adjudge. 2 Co. Instit. 635, 636. super Artic' cleri.*

So that at this day in all cases of high treason, whether those declared by the statute of 25 E. 3. *de prodicionibus*, or any other treasons newly enacted since, the privilege of clergy is wholly taken away; and, (which is the second proposition above mentiond.)

II. In all felonies, that were at common law before the statute of 25 E. 3. *pro clero*, and in all cases of petit treason by that statute the privilege of clergy is restored and settled.

And therefore in all such felonies or petit treasons, which were such at the time of the statute of 25 E. 3. *cap. 4. pro clero* clergy is allowable, unless in such cases where it is taken away by subsequent acts of parliament, and so far forth only as the same is so taken away.

But in what cases subsequent acts of parliament have taken away clergy, where at the time of the statute of 25 E. 3. it was allowable, shall be the business of the next chapter.

But yet there seem to be two felonies, where clergy was not allowable notwithstanding this act, namely certain acts, [333] that by interpretation of law were hostile acts, which was the reason, that I long since heard Mr. *Noy* then the king's attorney give for it

(b) *Vide supra p. 328. See also Part I. p. 185, 186. in notis, & p. 223. in notis.* (c) *Part I. p. 216.*

in the king's bench about 7 *Car.* 1. viz. 1. *Insidiato viarum & depopulatio agrorum.* 2. Wilful burning of houses.

1. Concerning the former of these it appears, that *insidiatores viarum* and *depopulatores agrorum* were ousted of their clergy notwithstanding the statute of 25 *E.* 3. *cap.* 4. *pro clero.*

Rot. Parl. 4 *H.* 4. n. 30. there was a complaint in parliament by the archbishop of *Canterbury* and clergy, whereupon it was enacted, that *that* general clause should be left out in indictments and words of the same effect inserted, and that notwithstanding the indictment carried the same effect, yet benefit of clergy should not be denied, as appears at large by the statute of 4 *H.* 4. *cap.* 2.

2. As touching wilful burning of houses I have heard, as before, that clergy was not allowable by the common law, but of this more fully in the next chapter.

Now touching *sacrilege* tho some later statutes were made to oust clergy in that crime, yet it seems at common law or at least after the statute of 25 *E.* 3. *cap.* 4. *pro clero* it was allowable, as appears 26 *Affiz.* 27. where it is agreed by the justices, that a person indicted of robbing a chapel and breaking a church should have his clergy; but it seems, it was with this difference, that if the ordinary refused him, as he might, he should not have his clergy. 20 *E.* 2. *Coron.* 283. *Stamf. P. C.* 123, 124, but otherwise the court would allow it him. 26 *Affiz.* 27.

See the references at the end of Ch. XLIV. ante.

[334]

CHAP. XLVI.

Where and in what offenses, *that where capital at common law*, clergy is taken away *in part or in all by acts of parliament subsequent to* 25 *E.* 3. *and first, of petit treason.*

I HAVE before declared what capital offenses were exempt from clergy at common law, and how the law stood in relation thereunto before and by the statute of 25 *E.* 3. and have there settled it, that regularly in all capital offenses, except treasons, which touch the king, the offender is to have the privilege of his clergy.

But

But as touching treasons, that touch the king, by virtue of the common law and the declaration of that statute the benefit or privilege of clergy is not allowable, neither is there any statute, that hath altered the law in that point of treason, but it stands still excluded from the privilege of clergy.

But as to petit treason and felonies subsequent statutes have made great alterations as to the point of clergy from what was declared by the statute of 25 E. 3. cap. 4. *pro clero*.

The inquiry therefore touching the alterations made by subsequent statutes in point of petit treason and felony may be considered in this method.

1. What alterations have been made by acts of parliament in relation to new felonies made by acts of parliament since 25 E. 3. And

2. What alterations have been made in such offenses, as were petit treason or felony at the time of the making of that statute.

I. As to the former of these this general rule holds, that if an act of parliament make a felony, and doth not take away clergy [335] in express words, in all those cases clergy is allowable.

And if it doth make a felony and takes away clergy not generally, but in such or such cases, regularly in other cases clergy is allowable, as if it takes away clergy in case the party be convicted by verdict, yet he shall have his clergy, if he stand mute.

But if it enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents; and because I have before in the particular enumeration of felonies by act of parliament taken notice all along what are excluded of clergy and what not, I shall dismiss that part of the inquiry referring myself to the several acts of parliament, that enact the felonies themselves; and shall proceed to the second part of the inquiry.

II. Therefore as to those felonies, that were such at the time of the statute of 25 E. 3. cap. 4. *pro clero*.

I shall first deliver some general positions, and then proceed to the particular felonies themselves.

1. Therefore it is certain, that whatsoever petit treason or felony there was at the time of the making of that statute, it was within the privilege of clergy by force of that statute at least, except those two above mentioned in the last chapter.

2. That

2. That therefore all such petit treasons and felonies are at this day within clergy, unless where it is ousted by subsequent statutes now in force.

3. That where any statute subsequent to 25 E. 3. cap. 4. hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitæ & privilegii clericalis* such statutes are construed literally and strictly.

And therefore, if clergy be ousted as to the principal, it is not ousted as to the accessory; if as to the accessory *before*, it is not extended to [336] the accessory *after*; if where the prisoner is convicted by verdict, it holds not as to a conviction by confession, nor as to an attainder by outlawry, nor to a standing mute, as we shall see in the subsequent instances.

4. That in all cases, where a subsequent act of parliament ousteth clergy in case of any felony, the indictment must precisely bring the party within the case of the statute, otherwise, altho possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alledged in the indictment, the party, tho convicted, shall have his clergy. *Stamf. P. C. fol. 130. a. Dy. 99. a. 183. b. 224. b. 261. a.*

5. Altho the case be so laid in the indictment, that it comes within the statute to exempt the prisoner from clergy, yet if upon the evidence it fall out that, tho it be a felony, yet it is not so qualified, as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the manner laid in the indictment, (as for instance guilty of the felony, but not of the robbery, or not of the breaking of the house,) and thereupon the prisoner shall be admitted to his clergy; and this is commonly done.

And now I come to the particular offenses, wherein clergy is taken away from such felonies, where by the common law and the statute of 25 E. 3. cap. 4. it was allowable.

And those offenses are these that follow.

1 Petit treason. 2 Murder. 3 Manslaughter. 4 Rape. 5 Robbery. 6 Burglary. 7 Larceny of several kinds and degrees.

And I shall now pursue them in the same order, as they are set down.

First, Petit treason, as the servant killing his master, &c.

It is plain, that after the statute of 25 *E. 3. cap. 4.* clergy was to be allowd until 12 *H. 7. cap. 7.* & 23 *H. 8. cap. 1.*

The first statute, that ousted clergy generally in petit treason, was that of 12 *H. 7. cap. 7.* which yet extended but to conviction or attainder, and only to the principal not to the accessary.

By the statute of 23 *H. 8. cap. 1.* it is enacted, “ That no
 “ person, which shall be found guilty after the laws of the [337]
 “ land for any manner of petit treason, or wilful murder of malice pre-
 “ pensed, or for robbing any churches, chapels, or other holy places, or
 “ for robbing any person or persons in their dwelling house or dwelling
 “ place, the owner or dweller of the same house, his wife, children,
 “ or servants then being within, and put in fear or dread by the same,
 “ or for robbing any person or persons in or near the highways, or
 “ for wilful burning of any dwelling houses or barns, wherein any
 “ corn or grain shall happen to be, nor any person found guilty of
 “ any abetment, procurement, helping, maintaining or counselling of
 “ or to any such petit treasons, murders or felonies shall from hence-
 “ forth be admitted to the benefit of clergy, except clerks in holy
 “ orders, viz. in the order of subdeacon or above; and that such
 “ persons in orders convict of those offenses shall be delivered to
 “ the ordinary, but shall remain in prison without purgation, unless
 “ he become bound by recognizance before the king’s justices,
 “ where he was convict, with two sufficient sureties for his good
 “ behaviour.

“ Persons attaind by judgment upon confession, outlawry, or verdict
 “ admitted to clergy to remain in prison without purgation.

“ Clerks convict, and upon their clergy allowd deliverd to the ordi-
 “ nary may be degraded, and then sent into the king’s bench by the
 “ ordinary to receive judgment upon their conviction, and the justices
 “ having the record before them shall give judgment upon such con-
 “ viction, as if had not had clergy.

This act, tho temporary, was continued by the statute of 23 *H. 8. cap. 1.* and made perpetual by 32 *H. 8. cap. 3.* and by the same act persons in orders are put into the same condition, as other persons not in orders, notwithstanding this statute of 23 *H. 8. cap. 1.* or 25 *H. 8. cap. 3.*

This statute of 23 *H. 8.* as to all these crimes extended to principals and accessaries before the fact, but not to accessaries after.

But

But yet it extended to exclude principals and accessaries *before*, only in cases where they were found guilty after due course of law, *viz.* by verdict or confession, &c. and extended not to standing mute, &c. And therefore by the statute of 25 *H. 8. cap. 3.* it is enacted, “ That every person that shall be indicted of petit treason, wilful burning of houses, murder, robbery, or burglary, or other felony according to the tenor or meaning of the said statute of 23 *H. 8.* and thereupon arraigned do stand mute of malice or froward mind, or challenge peremptorily above the number of twenty, or do not answer directly to the indictment and felony, whereof he shall be arraigned, shall be excluded from clergy in like manner, as if he had pleaded to the offense and been found guilty according to the laws of the land.

And provides, “ That if any person be indicted in a foreign county for stealing of goods in another county, and be found guilty, stand mute, challenge above twenty peremptorily, or will not directly answer, he shall be excluded from clergy, as he should have been, if he had been arraigned for the robberies or burglaries in the same shire where they were done, if by examination it shall appear to the justices, that he had been indicted and arraigned in the county where the burglary was done, he should have been excluded from his clergy by the said statute, had he been found guilty there.

This statute was but temporary, because bottomed upon the statute of 23 *H. 8. cap. 1.* that was but temporary, but by the statute of 28 *H. 8. cap. 1.* was continued till the last day of the next parliament, and by the statute of 32 *H. 8. cap. 3.* made perpetual.

But hitherto in this case of petit treason, (and indeed generally in all these cases of the statute of 23 *H. 8.*) there were these defects.

1. That as to the principal the statute of 23 *H. 8. cap. 1.* did extend to appeals, as well as indictments for the offenses described in that statute, and if they were found guilty by verdict or confession, the appellee and accessary *before* were excluded of clergy, but [339] statute of 25 *H. 8. cap. 3.* extended only to indictments, and therefore an appellee standing mute, &c. was to have his clergy in the cases of the statute of 25 *H. 8. cap. 3.* Again,

2. Neither of these statutes extend, where the party is outlawd for these crimes.

3. As

3. As the law was then taken, challenging above twenty had been a conviction, or at least had put the party to his penance; but that I may observe it once for all, now that clause of challenging above twenty mentiond in the statute of 25 *H.* 8. and other statutes hereafter mentiond imports nothing as to the point of clergy, for his challenge is over-ruled and he put upon the jury, as hath been before observed (*).

But because the statute of 1 & 2 *P. & M.* cap. 10. in case of petit treason restores the peremptory challenge of thirty-five, it should seem, that if he challenge peremptorily above thirty-five, he shall have the benefit of his clergy, for it is now become *casus omisus*.

And therefore by the statute of 4 & 5 *P. & M.* cap. 4. “ If
 “ any should maliciously command, hire or counsel any to commit
 “ petit treason, wilful murder, or to do any robbery in any dwelling
 “ house or houses, or to do any robbery in or near the highway, or
 “ to burn any dwelling house or any part thereof, or any barn then
 “ having any corn or grain in the same, then every such offender,
 “ 1. Being outlawd for the same, or 2. Arraigned and found guilty
 “ by order of law, or 3. Otherwise lawfully convict or attaind of
 “ the same, or 4. Who shall stand mute of malice or froward mind,
 “ or 5. Shall peremptorily challenge above twenty persons, or 6.
 “ Will not directly answer, is ousted of his clergy.

But *nota*, every indictment to oust the accessary *before* of his clergy must run *malitiosè*, otherwise he shall have his clergy. 2 *Eliz. Dy.* 183. *b.*

But now by the statute of 1 *E.* 6. cap. 12. it is enacted, “ That
 “ no person, that hath been, or shall be in due form of law attaind
 “ or convict of murder of malice prepenfed, or of poisoning
 “ of malice prepenfed, or breaking any house by day or by [340]
 “ night, any person being then in the house, where the same break-
 “ ing shall be committed, and thereby put in fear or dread, or of or
 “ for robbing any person or persons in or near the highways, or for
 “ felonious stealing of horses, geldings or mares, or for felonious
 “ taking goods out of any parish church or other church or chapel,
 “ or being indicted or appeald of any of the said offenses, and there-
 “ upon found guilty by twelve men, or shall confess the same upon
 “ his or their arraignment, or will not answer directly according to
 “ the laws of this realm, or shall stand wilfully or of malice mute,

(*) *p.* 270.

“ shall

“ shall be admitted to have the privilege of clergy or sanctuary, but
 “ shall be put from the same, and that all persons in all other cases
 “ of felony, other than such as are before mentiond, which shall be
 “ arraigned or found guilty upon their arraignment, or shall not con-
 “ fess the same, or stand mute, or will not directly answer, shall have
 “ and enjoy the benefit of clergy and sanctuary, as they might have
 “ had before the 24th of April 1 H. 8.

This statute doth not restore clergy to the principal in case of petit treason, but leaves the law in relation thereunto, as it stood before, and upon the statutes of 23 & 25 H. 8. tho there be no word of *petit treason*, for if the opinion of *Walsh* and my lord *Dyer* M. 6 & 7 Eliz. Dy. 235. a. be law, viz. that a general pardon of all offenses except murder, doth not except petit treason, and so petit treason comes not within the expression of *felony*, then the clause, *that in all other cases of felony clergy shall be allowd*, doth not extend to allow clergy in petit treason.

But if that opinion be not law (*a*), (as I think it is not) then the exclusion of clergy from murder by this statute excludes it also in petit treason.

But if it did not, yet it does not restore clergy in petit treason to the principal (*b*), where found guilty or attaint, because before
 [341] 1 H. 8. clergy was taken away in petit treason from the principal by 12 H. 7. cap. 7.

Again, by the statute of 5 & 6 E. 6. taking notice, that by the act of 1 E. 6. the act of 25 H. 8. cap. 3. touching robbers and burglars arraigned in a foreign county, and ousting them of clergy by examination stands repeald, whereby offenders were much emboldened, it is enacted, “ That the said act made in the 25th year of King
 “ H. 8. touching the putting such offenders from their clergy, [and
 “ every article, clause and sentence contained in the same touching
 “ clergy] shall from henceforth touching such offenses from hence-
 “ forth to be committed or done stand, remain, and be in full strength
 “ and virtue in such manner, as it did before the making of the said
 “ act in the said first year of King E. 6. any clause, article or sen-
 “ tence comprised in the said act of 1 E. 6. to the contrary thereof
 “ notwithstanding.

(a) Vide supra, Part I. cap. 29. p. 378.

(b) The words here in the original MS. are [takes not away clergy from the princi-

pal,] but the scope of our author's argument plainly shews he intended to have wrote [does not restore].

Now upon this act of 5 *E. 6. cap. 10.* it hath been taken, that not only the clause of the act of 25 *H. 8. cap. 3.* touching foreign felonies ousted of clergy upon examination, but the whole act of 25 *H. 8. cap. 3.* is re-enacted, and upon that account wilful burning stands by virtue of that act ousted of clergy, because ousted of clergy by 23 & 25 *H. 8.* tho no mention be made thereof in the statute of 1 *E. 6.* and accordingly resolved 11 *Co. Rep. 33. Alexander Poulter's case, de quo infra.*

Upon the whole matter it seems plain, that at this day in relation to petit treason the law stands thus.

1. The principal convict by verdict or confession is ousted of clergy by 23 *H. 8. cap. 1.* both in appeals and indictments.

2. The principal standing mute, or not directly answering is ousted of clergy by 25 *H. 8. cap. 3.* in cases of indictment, but not in case of an appeal; and the statute of 1 *E. 6. cap. 12.* doth not alter the case as to the principal in petit treason.

3. Yet I see no provision to oust clergy of a clerk attaint of petit treason by outlawry, but that he may claim his clergy and be delivered to the ordinary, as a clerk attaint without purgation, for this is not provided for, as it seems by these statutes. [342]

4. But in my opinion the statute of 1 *E. 6. cap. 12.* taking away clergy from persons attaint, as well as from persons convict of murder doth extend to petit treason, which is in truth murder, and consequently a person outlawd of petit treason, tho not by the statutes of 23 or 25 *H. 8.* yet the statute of 1 *E. 6.* is exempt from clergy under the name of wilful murder (*c*).

And the statute of 4 & 5 *P. & M. cap. 4.* taking away clergy from accessary *before* in case of petit treason, where attainted by outlawry, had committed a great piece of absurdity in putting the accessary in a worse case than the principal, unless the law had been taken, that the statute of 1 *E. 6. cap. 12.* had taken it away from the principal in the like case of outlawry, which is an attainder in law.

5. As to the accessary before the fact, he is ousted of clergy in all the cases before mentiond by the statute of 4 & 5 *P. & M. cap. 4.* and so the law stands at this day, but it must be laid *malitiosè. 2 Eliz. Dy. 183. b.*

(*c*) If this statute be construed to take away clergy from petit treason, it takes it away, as well in case of an appeal, as of an indictment, not only where the party is

convict by verdict or confession, but also where he will not answer directly, or shall stand wilfully mute.

6. But the accessary after the fact hath his clergy in all cases in petit treason, for no statute takes it from him.

I have been the longer in this, because it was necessary to take notice of the series of all the statutes, and to disentangle them, and it will serve for the briefer collection of what follows in other cases.

See the references at the end of ch. XLIV. ante.

[343]

C H A P. XLVII.

Concerning the alteration made by several statutes in cases of murder, manslaughter, rape, and wilful burning of houses or barns with corn.

I Shall briefly consider how the privilege of clergy stands as to murder, and therein.

1. At the common law, and by the statute of 25 E. 3. cap. 4. clergy was to be allowed as well in murder, as any other felony.

2. Tho there were some particular statutes, that in particular cases took away clergy in case of heinous murders (*), yet the first general law, that took away clergy in case of wilful murder *ex malitiâ præcogitatâ* generally was 23 H. 8. cap. 1. which extended only to a conviction by verdict or confession, and included accessaries *before*, and extended to appeals, as well as indictments.

3. The statute of 25 H. 8. cap. 3. extended only to indictments but not to appeals; to principals and not to accessaries *before* or after.

4. But the statute of 1 E. 6. cap. 12. took away clergy from principals in murder in all cases, *viz.* conviction by verdict or confession, attainder by outlawry or otherwise, standing mute, or not directly answering (*a*), but this statute of 1 E. 6. extended not to accessaries.

[344] 5. By the statute of 4 & 5 P. & M. cap. 4. all that shall maliciously command, hire, or counsel any to commit any wilful murder are ousted of clergy in all cases.

(*) *Vide* 12 H. 7. cap. 7. 4 H. 8. cap. 2: 22 H. 8. cap. 9.

(a) This statute omits the case of challenging above twenty, but this our author thinks unnecessary to be inserted, because *vide* 22 H. 8. cap. 14. neither penance nor

judgment of death is to follow in that case, but only the challenge is to be overruled, *vide supra* p. 270. & *infra* cap. 48. however this omission is supplied by 3 & 4 W. & M. cap. 9. as to indictments.

6. But accessaries to murderers after the fact have their clergy in all cases.

So that the principal stands at this day ousted of clergy in all cases, and the accessary *before* is also ousted of clergy in all cases, but the accessary *after* is in no case ousted of clergy.

But it must be remembered, that the party indicted must be brought within the very letter of the statute

If the indictment be *felonice & ex malitiâ suâ præcogitatâ interfecit*, yet he shall have his clergy, because there wants the word *murdravit*. Dy 261. a.

So if it be *felonice interfecit & murdravit*, and says not *ex malitiâ suâ præcogitatâ*, it is but an indictment of manslaughter, and the prisoner shall have his clergy.

So if a man be indicted, as accessary before, *viz. quòd præcepit*, and says not *malitiosè præcepit*. P. 2 Eliz. Dy. 183. b.

II. As to *manslaughter*, regularly in all cases the person indicted or appealed ought to be admitted to his clergy.

But if *A. B. and C.* be indicted specially upon the statute of 1 Jac. cap. 8. setting forth, (as the indictment must) "That *A. felonice pugit & percussit D.* not having any weapon drawn, nor having "stricken first, and that *B. and C.* were present, aiding and abetting," tho *A. B. and C.* are all principals in manslaughter at common law, yet *A.* only, that gave the stroke, shall be ousted of his clergy. H. 23 Car. 1. B. R. Page's case. (b).

And therefore it seems in that case, if it be found, that *A.* gave not the stroke, but *B.* and that *A. and C.* were aiding and abetting, not only *A. and C.* that gave not the stroke shall have their clergy, but also *B.* because, tho the case of *B.* is within the statute, yet as to him the indictment brings him not within the statute, and so differs from the case of a general indictment of murder, where tho it be laid, that *A.* gave the stroke, and *B.* was present, aiding and abetting, yet if upon the evidence it appears, that *B.* gave the stroke, [345] and *A.* was abetting, &c. both shall be convict of murder, for both are equally murderers, and the indictment is true as to both *quòd ex malitiâ suâ præcogitatâ interfecerunt & murdraverunt* (*).

By the statute of 1 Jac. cap. 8. clergy is ousted as to him that so stabs upon any conviction by verdict, confession or otherwise, and that as well in case of an appeal as of an indictment; but it extend,

(b) Styl. 26.

(*) Vide supra p. 292. 1 Salk. 334.

not to standing mute or not directly answering, for there is no conviction in that case, and so it seems as to an outlawry (*c*).

III. As to *rape*, by the statute of 18 *Eliz. cap. 7*. If any man be convicted thereof [by verdict or confession, or be outlawd for the same, he is excluded of clergy, but this act extends not to a standing mute or not directly answering, for this is *casus omissus* (*d*), and he shall have his clergy 11 *Co. Rep. 35. b* *Poulter's case*.

But at this day in all cases challenging above twenty makes nothing either for or against clergy, for the party shall not be put to his penance nor be convicted thereupon, but only his challenge shall be over-ruled and he put upon his trial, as hath been before observed (*†*), and therefore the clause in the act of parliament ousting clergy, where he challengeth above twenty, or the not mentioning of that clause makes nothing at this day one way or another as to the point of clergy.

But neither accessaries *before* or *after* are upon this statute exempt from the privilege of clergy.

IV. As to the case of *wilful burning*.

It stands now a settled point, that if the principal be convicted by verdict or confession, or stand mute, or will not directly answer, he shall not have his clergy, this is the point resolved 11 *Co. Rep. 35. a*. *Poulter's case*, and the constant practice is, and always hath been accordingly.

[346] And the statute of 4 & 5 *P. & M. cap. 4*. strongly proves the law to be so, for clergy is taken away from the accessary *before*, and it were a strange oversight, if an act of parliament should exempt the accessary from clergy in this case, and yet the principal should have the benefit of it.

That which caused the doubt was the statute of 1 *E. 6. cap. 12*. where it enumerates all the offenses, which were then to be exempt from clergy, and mentions not the case of wilful burning and enacts, "That in all other cases of felony the offenders shall have clergy, as they should have had before 1 *H. 8*." and the first statute that took away clergy from wilful burning of houses or barns with corn was a statute made after 1 *H. 8. viz. 23 H. 8. cap. 1. & 25 H. 8. cap. 3*.

There have been three answers given hereunto (*), *viz.*

(*c*) But in all these cases the offender is excluded from clergy by 3 & 4 *W. & M. cap. 6*. upon an indictment, but not in an appeal.

(*d*) But this is provided for in case of an indictment by 3 & 4 *W. & M. cap. 9*.

(*†*) *p. 270*.

(*) *Vide Part I. p. 570, &c.*

1. That this was a felony, that even by the common law before 1 *H. 8.* was exempt from clergy, being an act of hostility, and this I remember was given by *Noy* attorney general about 8 *Car. 1.* but possibly this may be doubtful as to the fact, whether at common law clergy were not allowable upon this offense, and if it were not, yet it is a greater doubt, whether that law were not altered by the act of 25 *E. 3. cap. 4. pro clero*, wherein clergy was settled in all cases, except treasons or felonies, that touch the king or his royal dignity.

2. Others have agreed, that clergy was taken away in these cases of wilful burning by the statutes of 23 *H. 8. cap. 1.* and 25 *H. 8. cap. 3.* and consequently this offense not being enumerated in the statute of 1 *E. 6. cap. 12.* is by the general concluding clause of that statute restored to the benefit of clergy: But then they think, that by the statute of 5 & 6 *E. 6. cap. 10.* the statute of 25 *H. 8. cap. 3.* is wholly revived, and consequently now the repeal of the exemption of clergy in case of wilful burning is repealed by the revival of the statute of 25 *H. 8. cap. 3.* by the subsequent statute of 5 & 6 *E. 6. cap. 10.* and thereby exemption from clergy in case of wilful burning is again established.

But this hath in it many difficulties. 1. It seems by the whole scope of the preamble and the strict penning of the [347] body of the act of 5 & 6 *E. 6. cap. 10.* that that act revived only so much of the act of 25 *H. 8. cap. 3.* as concerns the ousting of felons of their clergy upon examination, where robberies or burglaries were committed in foreign counties. 2. Again, the statute of 25 *H. 8.* took away clergy from wilful burning, only in cases of indictment, and that only where the prisoner stands mute, answers not directly, or challengeth above twenty, but the ousting of clergy in case of appeals, as well as indictments upon conviction by verdict or confession stood purely upon the statute of 23 *H. 8. cap. 1.* which is no where revived as to the point in question, and yet that is the case, that must most ordinarily occur, namely, where the party is convicted.

3. Therefore the last and I think the surest answer as to this difficulty is, that the statute of 3 & 4 *P. & M. cap. 4.* taking away clergy in all cases from him that maliciously commands, hires, or counsels the wilful burning of any dwelling-house or barn with corn, in all cases of conviction, attainder, standing mute, outlawry, peremptory challenge of above twenty, or not directly answering, doth by necessary consequence take away clergy in all these cases from the principal offender in such wilful burning.

But *quâcunque viâ datâ* the law stands settled, that clergy is taken away in all cases from the principal in wilful burning of a dwelling-house or a barn with corn, *quod vide* 11 Co. Rep. *Alexander Poulter's case per totum*.

And therefore I can by no means think, that outlawry of the principal in this offense is within the privilege of clergy, for the accessory even in that instance is exempt from (*e*) clergy by 4 & 5 P. & M. cap. 4.

Now as touching the accessory by the statute of 4 & 5 P. & M. [348] cap. 4. they that shall maliciously command, hire, or counsel this fact, *viz.* accessories *before*, are exempt from the benefit of clergy in all cases.

But accessories *after* are within the benefit of clergy in all cases.

See the references at the end of ch. XLIV. ante.

C H A P. XLVIII.

Concerning clergy in robbery from the house, or robbery from the person.

ROBBERY is of two kinds, from the person, and from the house of another.

First, Robbery from the person is a violent assault upon the person, and felonious and violent taking away his goods putting him in fear.

The principal in case of robbery in or near the highway is ousted of his clergy, *viz.*

1. By the statute of 23 H. 8. cap. 1. "Where he is convicted by verdict or confession, whether it be in an appeal or an indictment.

2. By the statute of 25 H. 8. cap. 3. "In an indictment, where the party stands mute, will not directly answer, or challengeth above twenty

And in case the robbery were in or near the highway in the county of *A.* and he carry the goods into the county of *B.* and there be indicted of larceny, and upon examination it appears it was such a robbery

(*e*) The MS. has it [*is subject to*] but both the statute and the sense require it should be [*is exempt from*.]

bery in the county of *A.* that had he been indicted in the county of *A.* he should have been ousted of his clergy by the statute of 23 *H. 8. cap. 1.* the justices of the county of *B.* shall oust him of his clergy in the county of *B.* whether he be convicted, stand mute, challenges above twenty, or answers not directly.

And tho this clause be repealed by the statute of 1 *E. 6. cap. 12.* it is again revived by 5 & 6 *E. 6. cap. 10.* and [349] stands now in force as to all robberies, where the party, if convicted, is to be ousted of his clergy by the statute of 23 *H. 8. cap. 1.*

But it extends not to any felony, where clergy is ousted by any statute after 23 *H. 8. Co. P. C. cap. 50. p. 115. Stamf. P. C. fol. 128. a. (*)*.

If *A.* commits a robbery near the highway in the county of *B.* and takes away but to the value of 6*d.* yet if indicted for robbery in the county of *B.* he shall have judgment of death without benefit of clergy, but if he carry those goods into the county of *C.* and there is indicted and pleads, and the jury find him guilty to the value of 6*d.* tho upon the evidence it appears that it was a robbery in the county of *B.* yet he shall not have judgment of death, because as it now stands, it is but petit larceny (*a*), where the prisoner is not to have his clergy but to be whipt, and the examination given by the statute of 25 *H. 8.* is only to oust clergy, where demandable. *M. 31 Eliz. Moore's Rep. n. 739. p. 550.*

If a man be indicted for a robbery *in viâ regiâ* (†), or *in altâ viâ*, or *in altâ viâ regiâ*, and be convicted, he shall be ousted of his clergy by the statute of 23 *H. 8.* but if it be laid to be in *in viâ regiâ pedestri ducent' de London ad Islington*, tho he be convicted, he shall have his clergy; adjudged 38 *H. 8. Moore's Rep. n. 16. p. 5.*

But in that case it might have been laid *propè altam viam regiam*, and he should have been oust of his clergy, for the words of the statute are *in* or *near* the highway.

If a man be robbed upon the river *Thames*, or other public river within the body of a county, this is a robbery upon the king's highway, and may be so laid in the indictment, and the party shall be ousted of his clergy upon these statutes, and so it was agreed in *Hide's*

(*) *Vide Part 1. p. 518.* But by 3 & 4 *H. 8. M. cap. 9.* the like clause is enacted as to all felonies, wherein clergy was ousted by that or any other statute.

(a) *Vide Part 1. p. 526.*

(†) According to what our author says *Part 1. p. 535.* if the indictment be laid only *in viâ regiâ*, this will not be sufficient to oust clergy.

case at *Newgate*, *M. 23 Car. 2.* for the public streams are highways, and therefore they are called *hautt streames le roy* (*).

But this statute of 25 *H. 8.* extends not to standing mute, or not directly answering in an *appeal*, but only in an *indictment*, and therefore,

3. The statute of 1 *E. 6. cap. 12.* ousts such robbery of clergy as well in an appeal as indictment, where the offender stands mute, or will not directly answer.

But mentions nothing of challenging peremptorily above twenty, neither need it, for, as hath been said (+), he shall be only put from his challenge, and the jury shall be charged to pass upon him, and no conviction or *peine fort & dure* shall ensue upon his peremptorily challenging above twenty, as the law now stands.

But whereas *Stamf. Lib. II. cap. 42. fol. 129. b.* affirms, "That upon all these statutes, and in all the cases mentioned in them there are two cases, wherein the offender in murder, robbery, &c. shall have his clergy, namely, where the offender is outlawed, or convicted by battle," it is not true of the former, for outlawry is an attainder, and tho 23 *H. 8. & 25 H. 8.* speak neither of outlawry nor attainder, yet the statute of 1 *E. 6. cap. 12.* saith, if any person be *attaint* or convicted of murder, &c. he shall be ousted of clergy.

And the same law it is, if the appellee of robbery be vanquished in an appeal, for he is thereby *convict*, and the statute doth not mention only a conviction by twelve men, but *any person in due form of law attaint or convicted of murder, &c.*

And thus far concerning principals.

As touching accessaries by malicious commanding, hiring or counselling any such robbery, they are ousted of clergy by 4 & 5 *P. & M. cap. 4.* in all cases, namely being convicted, standing mute, not directly answering, or outlawed, &c.

But accessaries *after* having the benefit of clergy in all cases.

Secondly, As touching a robbery from the house of any person.

This divides itself into these several heads.

[351] 1. Robbing in the dwelling house, the owner, his wife or family in the house and put in fear.

2. Robbing in the dwelling house, *any person* being in the house and put in fear.

(*) *V. de Par. I. f. 536.*

(+) *Supra, p. 27.*

3. Robbing in the house or tent, the owner, his wife, or servants being in the house, tho not being put in fear.

4. Robbing a house, and no person being therein.

As to these in their order.

I. Robbing any person in his dwelling house or dwelling place, the owner or dweller, his wife, children, or servants being within the same and put in fear or dread by the same.

By the statute of 23 H. 8. cap. 1. as well in an appeal as an indictment, the principal and accessory before the fact are ousted of clergy in two cases, namely,

1. If convicted by verdict. 2. If convicted by confession.

By the statute of 25 H. 8. cap. 3. there is farther provision made, but only in case of indictment, not of appeal, and only against the principal, but not the accessory *before or after, viz.* 1. If the principal stand mute of malice or froward mind. 2. If he challenge above twenty peremptorily. 3. If he will not directly answer.

There is farther provision made for ousting of clergy, where robbers of houses carry the goods into another county and be there indicted of larciny, if upon examination they should be ousted of clergy, had they been indicted in the first county; but, as hath been before observed,

1. This ousting of clergy by examination in a foreign county refers only to such robbery, as by the statute of 23 H. 8. cap. 1. is ousted of clergy; namely, where the owner, his wife, children, or servants are then in the house and put in fear, not to such robberies, as by acts of parliament made since are put out of clergy. 2. In case of an arraignment in a foreign county, if the goods prove to be but of the value of 12*d.* here is no clergy to be demanded or allowd, being but petit larciny, and therefore no ousting of clergy by examination.

Dorothy Cole (*) was indicted in *Suffex* for stealing goods, upon the evidence it appeared, that she broke a house in *Kent*, [352] and brought the goods into *Suffex*, the jury found the goods to be of the value but of 7*s.* yet in as much as there was no putting in fear of the owner, his wife, or family, she was to have the benefit of the statute of 21 Jac. and could not be ousted of it by examination, for tho by the statute of 39 Eliz. cap. 15. clergy was taken away, yet the taking away of clergy upon examination in a foreign county extends only

(*) *Vide Part I. p. 518.*

to robberies where clergy is taken away by 23 *H.* 8. but if it had been with a putting in fear, so that in case of a man he should have been ousted of his clergy, it deserves consideration, whether the woman, if under 10s. should have been ousted of the benefit of the statute of 21 *Jac.* cap. 6. by examination, tho originally it were a burglary and robbery. *Sed de hoc infra.*

But these statutes did not extend to any such robbery, where 1. There was no putting in fear. 2. Where the owner, his wife, children or servants were not in the house, but only a stranger were there and put in fear. 3. Neither did they extend to one attaint by outlawry or battle. 4. The statute of 25 *H.* 8. extended not to appeals.

As to the accessaries before the fact, by the statute of 4 & 5 *P. & M.* cap. 4. it is enacted, " That if any shall command, hire, or
" counsel any person to do any robbery in any dwelling house or
" houses, they shall be excluded from clergy in all cases, *viz.* convict,
" outlawd, standing mute, &c.

Upon this statute these things are observable.

1. It requires an actual robbing, *viz.* taking away some goods;
a bare breaking of the house is not sufficient.

2. It extends to a robbing, without mentioning *put in fear.*

3. It extends to outlawry, which 23 or 25 *H.* 8. extended not to.

4. It extends to appeals as well as indictments; but accessary *after*
are in no case excluded from clergy.

[353] II. Robbing of any person by day or night, any person
being then in the same house, and put in fear or dread
thereby.

By the statute of 1 *E.* 6. cap. 12. clergy is taken away in all cases, *viz.* if he be attaint by outlawry or otherwise, convict by verdict, confession, or wager of battle, stands mute, or will not directly answer: And this as well in appeals as indictments.

It is true, it mentions not peremptory challenge of above twenty, neither is it material for the reason before given.

But this statute, tho it speaks generally of breaking a house by day or by night, hath had this construction always allowd, *viz.*

If the breaking of the house be in the night, then it must be such a breaking as amounts to burglary, *viz.* with an intention to commit a felony, and then it ousts clergy, if it be with a putting in fear.

If it be a breaking the house in the day-time, then it must be also a breaking, as hath an actual robbery joined with it, and then if there be a putting in fear also, the clergy is ousted in all the cases mentioned in this statute.

But in both cases there must be a putting in fear, otherwise this statute ousts not clergy.

This statute therefore hath made these additions to the statutes of 23 & 25 H. 8. viz. 1. It exempts burglary from clergy, tho there be no robbery, if there be a putting in fear. 2. If there be a burglary in the night, or robbery in the day committed in the house, and any stranger be then in the house and put in fear, it excludes from clergy, tho it be not the owner or any of his family. 3. It excludes the principal from clergy in all cases, where he is not excluded by any of the two former statutes (*b*).

But again on the other side, it restores clergy to the accessory before the fact, tho convict by verdict or confession, and repeals so much of the statute of 23 H. 8. as excludes the accessory *before* from clergy. But as hath been said, the statute of 4 & 5 P. & M. cap. 4. takes off the clergy again from accessories where there is a robbery and a putting in fear, but not where there is only a burglary with a putting in fear, but without robbery; but accessories *after* in all cases have their clergy. [354]

III. If any person be found guilty of robbing any person in any part of his dwelling house or dwelling place, the owner or dweller of the same house, his wife, children, or servants then being within the same, or in any other place within the precinct of the same house or place, such offender shall not be admitted to his clergy, whether such dweller or owner, his wife or children then and there being shall be sleeping or waking. 5 & 6 E. 6. cap. 9.

And the same provision is made for excluding clergy, where a person shall commit a robbery in a booth or tent in any fair or market, the owner, his wife, children or servant being then in the same booth sleeping or waking.

Upon this act we are to observe,

1. There must be an actual breaking of the house, such a breaking as would make a burglary if committed in the night, and the indictment must run *fregit & intravit dominum mansionalem* J. S.

(*b*) Viz. in case of attainder by outlawry, and also in case of standing mute, or not directly answering in an appeal.

pro-

præfato J. S. uxore & liberis fuis in eâdem domo existent', and ſuch a breaking of the houſe muſt be provided in evidence: *vide ſupra, Lib. 1. cap. 44. p. 522.*

2. The alleging of ſuch a breaking of the houſe is ſufficient to bring him within the ſtatute to ouſt him of his clergy, if it be proved, tho it be not alleged by the way of robbery, *viz. violentè & à perſonâ*, but only *è domo prædictâ*, for it countervails a robbery within this ſtatute.

If the ſervant ſteal goods out of his maſter's houſe in the day or night, the maſter, his wife and children being in the houſe, the ſervant is not to be ouſted of clergy by this ſtatute, for here is no breaking of the houſe.

If the ſervant unlatch a door, or turn a key in a door in the houſe and ſteal goods out of that room, tho if he had been a ſtranger, that had not to do in the houſe, he ſhould hereupon be ouſted of his clergy, yet it ſeems to me the ſervant ſhall not be thereupon ouſted of his clergy, for the opening the door in this manner is [355] within his truſt and ſo no breaking of the houſe, nor robbery within this act, and the ſame law ſeems to be upon the ſtatute of 39 *Eliz. cap. 15.*

But if the ſervant break open a door, whether outward or inward, (as for the purpoſe a cloſet ſtudy, or counting-houſe,) and ſteal goods, this is a robbery and breaking the houſe within this ſtatute, as alſo within the ſtatute of 39 *Eliz.* for ſuch a breaking, tho by a ſervant in the night, would make burglary, for ſuch an opening is not within his truſt.

3. But there muſt not only be a breaking of the houſe, the owner, his wife, children or ſervants being within the ſame, but there muſt be alſo a felonious taking of the goods out of the houſe to exclude clergy by this ſtatute.

4. But a bare felonious taking of goods out of the houſe, whether by night or day without ſuch a breaking, as would make burglary, if done in the night, excludes not from clergy within this ſtatute.

5. This ſtatute both as to robbery in dwelling houſes or booths requires, that the dweller or owner, his wife, children, ſervants or ſervant be then within the houſe; ſo that the being of a ſtranger in the houſe excludes not clergy no more than upon the ſtatutes of 23 *H. 8. cap. 1. Stamf. P. C. fol. 129. b.*

6. It extends to no other case, but where the party is found guilty, viz. either by verdict or confession, and not to outlawry, standing mute, or not directly answering, therefore in all these cases the offender shall have his clergy. (*c*).

7. It extends to an appeal, as well as indictment.

8. It doth not exclude accessaries neither *after* nor *before* from clergy.

Neither doth the statute of 4 & 5 P. & M. cap. 4. extend to accessaries in this case, but only where robbery is committed, and any person within the house put in fear.

So that upon this statute all accessaries to the felony described by this statute are to have their clergy.

IV. Robbing from the house goods to the value of 5*s*. in [356] the day-time, no person being in the house.

By the statute of 39 Eliz. cap. 15. it is enacted, “ That if any
“ person be found guilty by verdict, confession, or otherwise for the
“ felonious taking away in the day-time of any money, goods or
“ chattels of the value of 5*s*. or upwards in any dwelling house or
“ houses, or any part thereof, or in any outhouse belonging or used
“ with the said dwelling house, altho no persons shall be in the said
“ house or outhouse at the time of the felony committed, such persons shall be excluded from their clergy.

1. Altho this statute speak only of *felonious taking* in the body or purview, yet inasmuch as in the preamble it speaks of *robbery* of houses, a bare taking of goods out of a house, no body therein, without an actual breaking of the house, such as would make burglary were it in the night, is not such a taking out of a house, as excludes from clergy, and thus it hath constantly obtained in practice against the opinion in *Popham's Reports* 84. *Bayne's case* (*d*).

2. The indictment must run according to the statute, viz. *quodd tempore diurno, scilicet inter horas &c. domum mansionalem J. S. fregit & intravit nullā personā in eādē domo tunc existente, & ibidem &c. in eādē domo inventa adtunc & ibidem felonice furatus fuit, cepit & asportavit*, for breaking the house in the day without taking goods is no felony. 11 Co. Rep. 36. *a. b. Poulter's case*.

(*c*.) But by 3 & 4 W. & M. cap. 9. clergy is taken away in these cases also.

(*d*.) This case therefore was not esteemed to be law, *Kel.* 68. but now by 10 & 11 W. 3. c. p. 23. clergy is taken away from all, who shall by night or day privately

and feloniously steal to the value of 5*s*. in any shop, ware-house, coach-house or stable, or by 12 Ann. cap. 7. to the value of 40*s*. in any dwelling house or outhouse thereto belonging, altho it be not broken, nor any person therein.

And

And if upon the evidence it fall out, that it was in the night, or that any person was in the house at the time, or that he stole, but broke not the house, he shall be found guilty of a simple felony and have his clergy, but not guilty according to the statute (*e*).

[357] But there need not either in this case, or upon the statute of 5 & 6 E. 6. above-mentiond be a formal mention of a robbery, as is used in an indictment for robbery from the person, for *fregit domum* imports it.

3. It takes away clergy only from the principal, and that only where the person is convict by verdict, confession, or otherwise, and therefore excludes not clergy, where the party stands mute, or is outlawd (*f*), or will not directly answer, nor from the accessory. 11 Co. Rep. 36. *b*. *Poulter's case*.

4. If a man break the house in the day-time with intent to steal, but steals nothing, this is no felony, but otherwise in case of breaking the house in the night with intent to steal, this is burglary 11 Co. Rep. 31. *b*. *Poulter's case*.

If a man enter by the doors or windows open and steal goods, this excludes not clergy upon this statute, nor upon the statute of 5 & 6 E. 6. cap. 9. for it must be such an act to make a robbery within either of these statutes, as would make a burglary, were it in the night; it must be *fregit & intravit*.

And therefore the constant use at *Newgate* is, and always hath been upon these statutes, that if a man enter the doors being open, and breaks open a chest and steals goods to the value of 5*s*. this shall not oust him of his clergy within this statute, or the statute of 5 & 6 E. 6. c. 9. (*g*).

But if a man enters an house the outward doors being open, and when he is in the house, breaks open, or unlocks or unlatcheth an inward door and steals goods out of the room to the value of 5*s*. he shall be ousted of his clergy upon this statute, the same being done in the day-time no body being in the house; or if he steals goods of any value out of that inward room so opened by day or by night, the owner of the house, his wife, children, or servants being in the house,

(*e*) But these cases are now provided against by 10 & 11 W. 3 & 12 Ann above-mentiond. *Vide Part I. p. 564. in notis.*

(*f*) These cases are since taken in by 3 & 4 W. & M. cap. 9. by which statute

clergy is also taken away from all who comfort, aid, abet, assist, counsel, hire, or command.

(*g*) *Vide Part I. p. 523, 524, 527, & Kel. 69.*

he shall be ousted of his clergy, being indicted upon the statute of 5 & 6 E. 6. cap. 9.

T. 16 Car. 2. Simpson's case (h) at Cambridge assises. A. [358]
being indicted upon the statute of 39 Eliz. it was found by special verdict, that *A.* breaking into the house by day, no body being in the house, and breaking open a chamber-door and a chest, took out goods to the value of 5*s.* and laid them on the floor, and before he could carry them out of the house was taken: By the advice of all the judges of England he was ousted of his clergy upon this statute, for the taking them out of the chest was felony, and the statute doth not alter the felony, but excludes from clergy, if it were done in the house, and of the value of 5*s.* and none in the house.

*Trin. 13 Car. 1. Evans & Finch (i) were indicted, for that they tempore diurno, viz. circa horam 12. did break domum mansionalem Hugonis Audley in the Inner-Temple London, nullâ personâ in eâdem domo existente, and stole thence 40*s.* Upon a special verdict found in this case, these points were resolved.*

1. That a chamber in an inn of court is *domus mansionalis* within this statute.

2. That if no body were in the chamber at the time, tho others were in other chambers of the temple, yet this was a breaking of the *domus mansionalis* Hugonis Audley nullâ personâ in eâdem domo existente, and maintains the indictment.

3. Because only one of the persons indicted did actually enter the chamber and took out the money, viz. *Evans*, and the other stood without upon the ladder and received it, *Evans* was excluded his clergy, and the other who stood upon the ladder and received the money had his clergy.

And possibly the same law may be upon the statute of 5 & 6 E. 6. cap. 9. that he only, that enters the house in the day- [359]
time without putting in fear, and actually takes the goods shall be excluded from clergy, and those, that stand without the house and

(*h*) According to this state of the case here was a breaking not only of a chest, but also of a chamber-door, which is on all hands agreed to be an act sufficient to make a robbery within the statute, and so the difficulty removed, which arises from this case, as stated above Part I. p. 524 & 527, and indeed as that case is reported in Keving p. 31. and in hoc libro Part I. p. 508. & p. 526. the question about the chest or trunk seems to have been only

with relation to the taking away, whether the taking goods out of a chest and laying them on the floor without carrying them out of the chamber was a taking away or stealing within the statute, and not whether it was a robbery, for if it were a stealing, that would be clear by the breaking open the chamber-door.

(*i*) Cro. Car. 473. vide Part I. §. 527. 556.

are present and abetting, tho all principals, yet shall have their clergy, for I can see no difference in the cases; *quære tamen (k)*.

But if it were a burglary, then as well those without, that were present and assisting, as those within, shall be excluded from clergy by the general words of the statute of 18 *Eliz. cap. 7. they that commit any manner of burglary*; and the like in rape and in murder.

And so I do take it without any difficulty, if *A. B. & C.* come to commit a robbery upon the person of a man, and *A.* only takes the money from the person, and *B.* and *C.* are present and assisting, or if they break a house in the day-time and commit a robbery in the house putting in fear, tho *A.* only enters the house, and *B.* and *C.* watch without, they shall be all excluded from clergy, for they are all robbers.

And if it should be otherwise, this great absurdity would follow, that *B.* and *C.* that are present, aiding and assisting in the robbery, should have a greater privilege, where they are present and so principals in the felony, than they should have had, if they had been absent, and only accessaries before the fact, in which case the statute of 4 & 5 *P. & M. cap. 4.* excludes them from clergy in all cases.

See the references at the end of ch. XLIV. ante.

(k) This doubt is now at an end, for by 3 & 4 of *W. & M. cap. 9.* clergy is excluded from all aiders, abettors, &c.

[360]

C H A P. XLIX.

Concerning clergy in burglary.

BURGLARIES may be of two kinds. 1. Simple burglary, that hath no robbery joined with it. 2. Burglary, that hath robbery or theft joined with it.

I. The former of these is, when a man in the night-time breaks and enters a house to the intent to commit a robbery, theft, or other felony.

And this, as it had the benefit of clergy by the common law and by the statute of 25 *E. 3. cap. 4. pro clero*, so it was not ousted of clergy
neither

neither by the statute of 23 *H. 8.* nor the statute of 25 *H. 8.* but the first statute that ousted clergy in burglary was 1 *E. 6. cap. 12.*

This simple burglary is again of two kinds. 1. Where any person is in the house and put in fear or dread. 2. Where no person is put in fear or dread, as possibly where no person is in the house, which yet taketh not away the offense of burglary. *Popham's Rep. 42. per omnes justiciarios Angliæ*, or if any person being in the house, yet is sleeping and perceives not the burglary till the next morning, &c.

1. In the *first* of these cases of simple burglary, namely with putting in fear or dread, the statute of 1 *E. 6. cap. 12.* takes away clergy from the principal in all cases, *viz.* tho attaind by outlawry or otherwise, or convict, or standing mute, or not directly answering, as appears by the statute itself, and the interpretation made of it. *Stamf. P. C. fol. 126. a. 11 Co. Rep. Poulter's case.*

But clergy is not taken away from accessaries *before* or *after* by this or any other statute, for as to the statute of 4 & 5 *P. & M.* tho it take away clergy from those, that maliciously command, or hire, or counsel any person to do any robbery in any dwelling house, yet unless there be a robbery in the dwelling house, as well as a burglary, it takes not away clergy from the accessary *before* [361] (*a*), nor at all from the accessary *after*.

2. As to the *second* kind of simple burglary without putting in fear, the statute of 18 *Eliz. cap. 7.* generally takes away clergy from all persons that shall commit any manner of burglary in three cases. 1. If he be outlawed for it. 2. If he shall be found guilty of it by verdict, or 3. If upon his arraignment he shall confess it.

But in all other cases of standing mute, or not directly answering he is to have his clergy (*).

And therefore, if a man be generally indicted of burglary without pursuing the statute of 1 *E. 6. cap. 12. viz.* without alleging in the indictment, that the owner, his wife, children or servant were in the house and put in fear, the prisoner standing mute, or not directly answering shall have his clergy, (namely, where the indictment is general,) notwithstanding the statute of 18 *Eliz. cap. 7.*

But the accessaries as well *before* as *after* are within privilege of clergy, for neither this nor any other statute hath excluded them (*a*).

(*) By the said statute of 3 & 4 of *W. & M.* clergy is taken away also in cases of standing mute, or not directly answering.

(a) But by 3 & 4 of *W. & M. cap. 9.* clergy is taken away from the accessary before the fact.

II. But now as to burglary joined with larceny or robbery in the dwelling house, this again is of two kinds, either with putting in fear, or without putting in fear.

If with putting in fear, then by the statute of 23 *H. 8. cap. 1. & 25 H. 8. cap. 3.* the owner or dweller, his wife, children, or servants being within the house and put in fear, the offender is ousted of his clergy, not upon the account of the burglary simply considered, but upon the account of the robbery, if the party be found guilty by verdict or confession, or stand mute, or will not directly answer.

But by the statute of 1 *E. 6. cap. 12.* he is excluded from clergy in all cases, if any person were in the house and put in fear.

[362] And altho as to the accessaries *before*, the statute of *E. 6. cap. 12.* restores clergy unto them, yet by the statute of 4 & 5 *P. & M. cap. 4.* clergy is in this case taken away from accessaries before the fact, *viz.* counsellors, or commanders to do any robbery in a mansion-house are ousted of clergy in all cases.

But if it were a burglary joined with robbery of goods out of the house, whether the party were put in fear or not, the principal is ousted of clergy by the statute of 18 *Eliz. cap. 7.* upon the single account of the offense of burglary, (if the offender be outlawed or convicted by verdict or confession,) for that statute as to the point of clergy is not at all concerned as to the robbery, but singly upon the account of burglary the clergy is ousted, tho he be acquit of the robbery or larceny.

But then as to the accessaries before the fact it is considerable, whether in burglary joined with robbery without putting in fear the accessory shall be ousted of clergy by the statute of 4 & 5 *P. & M. cap. 4.* it seems to me to be with this difference.

If the principal be indicted upon the statute of 5 & 6 *E. 6. cap. 9.* specially, setting forth, that the offender *felonice & burglariter fregit domum J. S. prædicto J. S. uxore, liberis & servientibus suis in eadem domo existentibus*, and stole the goods in the same house, then the accessory to such an indictment shall be arraigned and tried, and if convicted shall be ousted of his clergy by force of the statute of 4 & 5 *P. & M. cap. 4.*

But if in that case the principal be convicted of the burglary, but acquit of the robbery, the accessory shall have his clergy, for the statute of 4 & 5 *P. & M.* doth not exclude the accessory from clergy, but where there was a robbery.

And

And again, if the principal be indicted generally of burglary and robbery without forming the indictment either upon 23 *H. 8.* of putting in fear, or upon the statute of 5 & 6 *E. 6.* the owner, his wife or children being in the house, tho the principal be convicted and ousted of his clergy by the statute of 18 *Eliz.* yet the [363] accessory shall have his clergy, altho here were a robbery committed in the dwelling house, and so within the statute of 4 & 5 *P. & M. cap. 4.* and the reasons are apparent.

1. Because the principal is not ousted of his clergy in respect of the robbery, for that not being laid according to either of the statutes of 23 *H. 8.* or 5 & 6 *E. 6.* if there were no burglary in the case, he should have had his clergy, and he is ousted of his clergy merely upon the account of the burglary by the statute of 18 *Eliz. cap. 7.* and not of the robbery, because not laid pursuant to either of these statutes of 23 *H. 8.* & 5 & 6 *E. 6.* and the statute of 4 & 5 *P. & M.* ousts the accessory of clergy in relation to the robbery in the dwelling house, and not in relation to the burglary.

2. Because the statute of 4 & 5 *P. & M.* cannot at all have any respect to the statute of 18 *Eliz.* which was made twenty years after, and at the time of the statute of the queen neither simple burglary, nor burglary joined with robbery had ousted the principal of clergy, unless the robbery were pursuant to the statutes of 23 *H. 8.* or 5 & 6 *E. 6.* which is not laid in the indictment pursuant to either, and therefore the accessory could not be ousted of clergy by 4 & 5 *P. & M.* in this case, when if the principal himself had been indicted of burglary and robbery generally, he should have had his clergy both as to the burglary and as to the robbery; so that upon a general indictment of the principal of burglary and robbery in the house, the accessory can in no sort be excluded of clergy, unless the principal be specially indicted of the robbery pursuant to the statute of 23 *H. 8.* the owner, his wife or children being in the house and put in fear, or according to the statute of 5 & 6 *E. 6. cap. 9.* the owner, his wife or servants being in the house, for tho the principal upon a general indictment of burglary and robbery may be ousted of his clergy by the statute of 18 *Eliz.* if found guilty of the burglary, yet he cannot be ousted of his clergy upon the account of the robbery, because not particularly laid according to the old statutes, and consequently the accessory must [364] in that case have his clergy (*b*).

(*b*) But as to this point the law is now altered, for by 3 & 4 *W. & M. cap. 9.* clergy is taken away from the accessory before in all cases of burglary.

But in all cases accessories *after*, must have their clergy.

See the references at the end of ch. XLIV. ante.

CHAP. L.

Concerning clergy in simple larceny and other felonies.

I Come now to consider of some other kinds of felonies, wherein clergy is taken away, and especially in larcenies of several kinds.

1. Stealing of horses. 2. Sacrilege. 3. Taking from the person *clām & secretē*. 4. Servants robbing their masters. 5. Taking clothes off from racks. 6. Stealing king's stores. 7. Taking away women against their wills. 8. I shall consider of piracies and robberies upon the sea. 9. Concerning clergy of prisoners arraigned before the steward and marshal.

I. By the statute of 1 E. 6. *cap.* 12. the felonious stealing of horses, mares or geldings is put from the privilege of clergy.

1. If the person be attainted. 2. Or convicted by *verdict* or confession. 3. Or stands mute. 4. Or will not directly answer. This was in effect enacted before by 37 H. 8. *cap.* 8. but it was necessary to be re-enacted here, because otherwise the general clause in the act of 1 E. 7. *cap.* 12. restoring clergy in all cases where they had it before 1 H. 8. had restored clergy in this case.

[365] There arose a doubt, whether, if there were one horse, mare, or gelding stolen, the offender should have had clergy; and the reason of the doubt was not singly, because the statute of 1 E. 6. was in the plural number, *horses, mares, or geldings*, for then it might as well have been a doubt, whether upon the statute of 23 H. 8. *cap.* 1. he, that had wilfully burned one house, should not have had his clergy, because the words of that statute are in the plural number *dwelling houses or barns*; and so for robbing any *churches or chapels*.

But the reason that made the scruple was, because the statute of 37 H. 8. *cap.* 8. was expressly penned in the singular number, *If any man do steal any horse, mare or filly*: and then this statute of 1 E. 6. thus varying the number, and yet expressly repealing all other exclusions of clergy introduced since the beginning of H. 8. made some doubt,

whether

whether it were not intended to enlarge clergy, where only one horse was stolen.

To remove this doubt was the statute of 2 & 3 E. 6. cap. 33. whereby clergy is excluded from him that steals one horse, gelding or mare in all the cases of attainder, conviction, standing mute, or not directly answering.

These statutes exclude the principal from clergy in all these cases, but the accessary *before* or *after* have the privilege of clergy. 1 Mar. Dy. 99 a.

But by the statute of 31 Eliz. cap. 12. *in fine statuti* accessaries both *before* and *after* in horse stealing are ousted of clergy, as the principal ought to be.

II. As to sacrilege, *viz.* the felonious taking of any goods out of any parish church, or other church or chapel, the principal is ousted of clergy by the statutes of 23 H. 8. cap. 1. 25 H. 8. cap. 3. and lastly by 1 E. 6. cap. 12. in all cases above-mentioned.

And by the statute of 23 H. 8. cap. 1. the accessary *before*, if found guilty by verdict or confession, was of clergy, but that is repealed by 1 E. 6. cap. 12. as to all accessaries.

And the statute of 4 & 5 P. & M. cap. 4. extends not to this case, for it takes away clergy from robbery of any dwelling house, but doth not extend to robbing of churches or chapels (*c*). [366]

And certainly clergy was not taken away in case of sacrilege at common law, or if it were, yet the statute of 25 E. 3. *pro clero* cap. 4. restored clergy in that case as well as others, and the statutes of 23 H. 8. & 1 E. 6. had been needless in this case, if sacrilege were ousted of clergy at common law, and accordingly in the book of 26 Affiz. 19. (*d*) and consequently it is mistaken in *Poulter's case* 11 Co. Rep. 29. b.

III. As to picking of pockets, by the statute of 8 Eliz. cap. 4. "If any person be indicted or appealed for felonious taking any money, goods, or chattels from the *person* of another *privily without his knowledge* in any place whatsoever, and be found guilty by twelve men, or confess upon his arraignment, or be outlawed, or stands obstinately mute, or will not directly answer, or challenge peremptorily above twenty, he shall be excluded from clergy.

(*c*) But if this should be construed a burglary, as it seems to be according to the book of 22 Affiz. 95. then clergy would be excluded from the accessaries *before*, by the 3 & 4 of W. & M. cap. 9.

(*d*) *Vide accordant* 26 Affiz. 27. *Corone* 193. *Vide contra* 20 E. 2. *Corone* 283. but according to *Stamf. P. C. fol. 123. b.* it was left to the discretion of the ordinary to claim him or not. *Vide Co. P. C. p. 114.*

Upon this statute these things are observable.

1. It must be taken from the *person*.
 2. It must be taken *privily without his knowledge*, and so laid in the indictment, otherwise he shall have his clergy.

3. The goods must be above the value of 12*d.* for tho in robbery of never so small a value clergy is ousted, because done *violently*, yet here it is otherwise, for if it be not above the value of 12*d.* it is but petit larceny, for the statute did not intend to alter the nature of the crime, but to exclude clergy, where it was grand larceny. *Co. P. C. cap. 16. p. 53. (c).*

[367] 4. It doth not oust the necessary either *before* or *after* of the privilege of clergy.

IV. Concerning servants carrying away their masters goods to the value of 40*s.* this was made felony by the statute of 21 *H. 8. cap. 7. (f).* And by the statute of 27 *H. 8. cap. 17.* clergy was taken away.

By the statute of 1 *E. 6. cap. 12.* restoring clergy in all cases, as it was before 1 *H. 8.* except the cases mentioned in that statute, clergy is restored to that offense.

By the statute of 1 *Mar. cap. 1.* repealing all felonies enacted since 1 *H. 8.* the very act itself of 21 *H. 8.* making this felony is repealed.

But by the statute of 5 *Eliz. cap. 10.* the statute of 21 *H. 8.* is again re-enacted to have continuance for ever; but the statute of 27 *H. 8. cap. 17.* taking away clergy in that offense is not revived and so clergy stands allowable as to that offense at this day (*g*).

V. By a statute made the 22 *Car. 2. cap. 5.* clergy is taken away from those that steal clothes off the racks, with power in the judge to transport them to the king's plantations (*h*).

VI. By

(*e*) *Vide Part I. cap. 44. p. 529.*

(*f*) This statute is to be taken strictly with relation to such goods, as are actually delivered to keep by the *maſter* or *miſtreſs* *Dy. 5. a. b.* for as to other goods, it was a felony at common law, tho under the value of 40*s.* but where there was a delivery, the servant being in lawful possession, it could not at common law be a felony, *vide Part I. p. 667.* Otherwise therefore it is in the case of a lodger stealing goods or furniture belonging to his lodgings, because he is not intrusted with the possession, but only with the use, and therefore it was felony at common law; *vide Part I. p. 566.* however to obviate all doubt, it is enacted and declared by 3 & 4 *W. & M. cap. 9.* "That if any person or persons shall take away with

"an intent to steal, imbezzle, or purloin
 "any chattel, bedding or furniture, which
 "by contract or agreement he or they are
 "to use, or shall be let to him or them to
 "use in or with such lodging, such taking,
 "imbezzelling, or purloining shall be to
 "all intents and purposes taken, reputed
 "and adjudged to be larceny and felony,
 "and the offender shall suffer as in case of
 "felony.

(*g*) But since our author wrote is taken away again by 12 *Ann. cap. 7.* from all persons, (except apprentices under the age of fifteen years, who shall rob their masters,) if the offense be committed in a dwelling house or outhouse.

(*h*) By 4 *Geo. 2. cap. 16.* the stealing linen, suttan, &c. from any whitening ground

VI. By the statute of 22 *Car. 2. cap. 5.* clergy is taken away from those that imbezzele or steal the king's stores (*i*).

VII. By the statute of 39 *Eliz. cap. 9.* clergy is taken away from offenses committed against 3 *H. 7. cap. 2.* concerning taking away and marrying or defiling of women in all cases, *viz.* upon attainder, conviction by verdict or confession, standing mute, challenging above twenty peremptorily, outlawry, not directly answering.

It extends to take away clergy in these cases from all principals and accessaries before the fact in express words, but not from accessaries after.

VIII. As to the statute of 28 *H. 8. cap. 15.* concerning piracy, robbery, murders and manslaughters upon the sea, it is enacted, "That for treason, murder, robbery, felonies and confederacies done upon the sea or in any places whereto that commission extended (*k*), the offenders shall not be admitted to have the benefit of clergy or sanctuary, but are excluded from the same (*l*)

Upon

grounds to the value of 10*s.* or buying or receiving the same, knowing it to be stolen is excluded from clergy with power to the court upon the circumstances of the case to transport the offender for seven years.

(*i*) *Viz.* in such manner as is forbid by 21 *Eliz. cap. 4.* whereby it was made felony: *vide Part I. p. 688.*

(*k*) It was a doubt upon this statute, whether an accessory at land to a felony or piracy at sea was included within the extent of the commission directed by this act, *Telo. 134, 135.* but by 11 & 12 *W. 3. cap. 7.* (continued by 5 *Ann. cap. 34. 1 Geo. 1. cap. 25.* and made perpetual by 6 *Geo. 1. cap. 19.*) it is provided, "That accessories to piracy before or after shall be tried and adjudged according to 28 *H. 8.* and shall suffer the same penalties and in like manner as the principals.

If a mortal stroke be given on the high sea, or on the shore at full sea, and the party die upon the shore at low water, this is not within this statute, nor shall the admiral have jurisdiction to try the offense, nor yet can it be tried at common law by a general commission of *oyer and terminer*: *vide supra. p. 20 & Part I. p. 426.* To remedy this inconvenience it is provided by 2 *Geo. 2. cap. 21.* "That where any person shall be feloniously stricken or poisoned upon the sea or any place out of *Er. land*, and shall die thereof in *England*; or shall be feloniously stricken or poisoned at any place in *England*,

"and shall die thereof upon the sea or any place out of *England*, an indictment may be found in such county, where such death, stroke, or poisoning shall happen, against both principals and accessories, and may be proceeded upon in the same manner as if such felonious stroke and death, or poisoning and death had happened in the same county, where such indictment shall be found.

(*l*) It was doubted, whether this statute of 28 *H. 8.* had not taken away the trial of these offenses before the admiral, or his lieutenant or commissary, which had occasioned a total disorder of such manner of trial to the encouragement of pirates, who could not be tried by this statute, unless at great trouble and expence, brought to *England*, and therefore the aforesaid statute of 11 & 12 *W. 3. cap. 7.* provides, that they may be tried by the court of admiralty according to the directions of that act, which are there particularly mentioned.

By the same statute it is enacted, "That if any of the king's natural born subjects shall commit any piracy, robbery, or act of hostility against other the king's subjects, altho it be under colour of a commission from any foreign prince; or being a commander or master of a ship, or seaman shall feloniously run away with his ship, &c. or voluntarily yield up the same to any pirate,

"or

Upon consideration of the statute of 1 E. 6. cap. 12. which in all cases not mentiond in that statute restores the privilege of clergy, as it was before 1 H. 8. it is said in *Poulter's case* 11 Co. Rep. 31. b. that thereby clergy is restored in case of piracy.

But upon consideration of both these statutes I think as followeth, viz.

1. *First*, That by the statute of 1 E. 6. cap. 12. in all other felonies (not particularly excepted by the statute of 1 E. 6. cap. 12.) that the common law takes notice of, clergy is restored by the statute of 1 E. 6. cap. 12. notwithstanding this statute of 28 H. 8. cap. 15. even for felonies within that jurisdiction or commission of the admiralty settled by that statute.

And therefore, if a man be slain below the bridges upon the river *Thames*, but not *ex malitiâ*, or if a larciny be committed there, that is within clergy, if committed upon the land, the party shall be admitted to his clergy by force of the statute of 1 E. 6. cap. 12.

2. *Secondly*, if such a felony were committed upon the high sea, that were not excepted by the statute of 1 E. 6. cap. 12. but should have had clergy by that statute were it upon the land, in such case, [370] tho the proceeding be by the statute of 28 H. 8. the party shall have his clergy, for the statute of 1 E. 6. is general, in all other cases of felony clergy shall be allowd as it was before 1 H. 8. and the exemption of clergy (*) was before that statute of 28 H. 8. extendible to the admiral's jurisdiction, as well as to courts of common law.

3. *Thirdly*, But as to piracy or robbery upon the sea by pirates and rovers I think clergy remains still taken away by the statute of

" or bring any seducing message from any
" pirate, enemy, or rebel, or endeavour
" to corrupt any commander, &c. to yield
" up or run away with any ship, &c. or
" turn pirate, or go over to pirates, or if
" any person shall lay violent hands on his
" commander to hinder him from fighting
" in defense of his ship or goods, or shall
" confine his master, or endeavour to make
" a revolt in his ship, every such person
" shall be adjudged a pirate, felon and
" robber.

By 8 Geo. 1. cap. 24. " All persons, who
" by 11 & 12 W. 3. cap. 7. are declared
" accessories to any piracy there mentiond,
" are declared to be principal pirates.

By the same statute it is provided, " That
" if any one shall trade with or furnish
" any pirate, &c. with provisions, &c. or

" shall fit out any ship or vessel with such
" design, or shall consult or correspond
" with any pirate, &c. knowing him to
" be such, or shall forceably board and
" enter any merchant ship on the high seas,
" or in any port, haven or creek, and
" shall throw over-board or destroy any
" part of the goods or merchandizes be-
" longing to such ship, such offender shall
" be adjudged guilty of piracy, and shall
" be tried according to the statutes of 28
" H. 8. & 11 & 12 W. 3. and being con-
" victed shall suffer as a pirate without
" benefit of clergy.

(*) *Viz.* the allowance of clergy; for our author here means by *exemption of clergy* the privilege of being exempted on account of clergy from punishment in the king's temporal courts.

28 *H. 8.* and is not restored by 1 *E. 6. cap. 12. (m)*, and the reasons are,

1. Because I take it before 1 *H. 8.* there was no clergy allowable for it at common law, for it was an act of hostility, and consequently is not touched by the statute of 1 *E. 6. cap. 12.*

2. Admitting that clergy were allowable in piracy before 1 *H. 8.* and taken away merely by the statute of 28 *H. 8. cap. 15.* yet clergy is not restored by 1 *E. 6.* therein, because it restores it only in *all other cases of felony*, which is intended only of felony, whereof the common law takes notice, but piracy is of another nature, and the common law takes not notice of it under the name of *felony*, and therefore a pardon of all *felonies* pardons not *piracy*: *vide Co. P. C. cap. 49. p. 112, 113.* and accordingly the use hath obtained in the proceedings of the commissions founded upon 28 *H. 8.*

IX. As to the statute of 33 *H. 8. cap. 12.* touching felonies in the king's household and proceedings thereupon before the lord steward there is a clause, that in case of manslaughter in the king's house tried before the lord steward, and also in all other felonies committed within the king's house, the offenders, the abettors, procurers, and receivers being convict shall suffer pains of death, as appertaineth to felons, without benefit of clergy.

In my opinion the statute of 1 *E. 6. cap. 12.* hath repeald [37¹] so much of this statute, as excludes from clergy such offenses as are not exempt from clergy by 1 *E. 6.* for these are felonies, that the law takes notice of, and such wherein clergy was allowable before 1 *H. 8.* and consequently the general words of that act restore clergy in these cases, tho the proceeding thereupon be before the lord steward by this act of 33 *H. 8. cap. 12.* for the words of 1 *E. 6. cap. 12.* are general in *all other felonies*, and they are *in materiâ favorabili*, in case of life, and in case of a privilege, which hath been ever favoured in law, and therefore shall be generally construed and not restrained by construction or interpretation.

See the references at the end of ch. XLIV. ante.

(m) As to those who shall commit any offense, for which they ought to be adjudged pirates, felons, and robbers by 11 *E. 12 H. 3. cap. 7.* clergy is expressly taken away from such by 4 *Geo. 1. cap. 11.* and

as no mention is made of such as were deemed pirates before that statute, it is an argument, that the law was taken to be, that they were oulited of clergy before.

C H A P. LI.

What persons are or are not capable of clergy.

I HAVE gone through the consideration of the *crimes* or offenses, wherein clergy is, or is not allowable; I now come to consider the *persons* that are, or are not capable thereof, admitting the crimes themselves within clergy.

Touching persons to be admitted to clergy, succession of times hath made great change in the law. Antiently *Nuns* professed were admitted to the privilege of clergy, tho they could not be priests, yet they are within the *privilegium* or *immunitas ecclesiæ*, and had their clergy, 22 E. 3. *Coron.* 461. but other women had not by the common law the privilege of clergy.

But at this day possession is abolished, and no woman admitted to the privilege of clergy at this day; only by the statute of 21 Jac.

[372] *cap.* 6. if a woman be lawfully convicted by verdict or confession of stealing goods under the value of 10s. and above the value of 12d. being such an offense, wherein a man might have his clergy, she shall for the first offense be burnt in the hand, and to be farther punished with whipping, sending to the house of correction, imprisonment, &c. as the judge shall in discretion think fit, this act hath continuance to this day by the statutes of 3 Car. 1. *cap.* 4. 16 Car. 1. *cap.* 4. (a).

Again by the statute of bigamy *cap.* 5. (b) *Bigamus* was ousted of clergy, 40 Affiz. 17. but by the statute of 1 E. 6. *cap.* 12. he is restored to the benefit of clergy, if the offense be within clergy, and tho *Stamf. Lib.* II. *cap.* 46. fol. 134. b. doubts whether that point of the statute be not repealed by the statute of 1 & 2 P. & M. *cap.* 8. whereby all statutes against the authority of the Pope or See of Rome are repealed, yet the law hath been sufficiently settled in this point, that *bigamus* hath his clergy at this day T. 3 Eliz. Dy. 201. b. *Lamb's* case, for by the statute of 1 Eliz. *cap.* 1. all the clauses in the statute

(a) But now upon the statute of 3 & 4 of W. & M. *cap.* 9. a woman convicted or outlawd for any felony, for which a man might have his clergy, shall upon praying the benefit of that statute be subject only

to such punishment, as a man would be in the like case, viz. be burnt in the hand and detained in prison at the discretion of the judge, not exceeding one year.

(b) 2 Co. *Instit.* p. 273.

of 1 & 2 P. M. cap. 8. not specially excepted are repeald, and this is none of the excepted clauses, and so the statute of 1 E. 6. cap. 12. stands renewed by 1 Eliz. cap. 1. if at all impeached or repeald by 1 & 2 P. & M.

Again, at common law, if the clerk convict deliverd to the ordinary had broke the bishop's prison and been after taken, he had lost the benefit of his clergy, 22 E. 3. *Coron.* 257. but at this day that can never come in question, for by the statute of 18 Eliz. cap. 7. clerks convict are not now to be deliverd to the ordinary, but burnt in the hand and so discharged.

Again, antiently the law was held, that if the prisoner had not *habitu* & *tonsuram clericalem*, he should not have the benefit of clergy, 26 Affiz. 19. 20 E. 2. *Coron.* 233. or the ordinary might have refused him, tho he could read; but in proceſs of time [373] that law was altered and the court would admit him to his clergy, if the case were within clergy, tho he had not *habitu* & *tonsuram*, if he could read, and tho the ordinary refused him upon that account. 9 E. 4. 28. b. 34 H. 6. 49. a. b.

A man attaint (*) of hereſy, a Jew, or a Turk shall not have their clergy, but a person excommunicate shall have his clergy. 11 Co. Rep. 29. b. *Poulter's case*.

A Greek or alien, who knows not our letters, shall have his clergy, and shall read in the book of his own country. B. Clergy 20.

A bastard, a man blind shall have his clergy (c), if he can speak *Latin* congruously. B. Clergy 21, 22.

By the statute of 4 H. 7. cap. 13. "A man not within holy orders, that hath once had his clergy, shall be burnt in the hand with M or T, and being after arraigned for any such offense, (*viz.* an offense within clergy,) he shall not be admitted to his clergy a second time. "And if any man upon a second arraignment for such offense claim his clergy, as being a clerk in orders, if he have not his letters of orders, or certificate of the ordinary witnessing the same, the justices shall by their discretion give him a day to bring them, at which day if he fail, he shall lose his clergy that second time.

(*) This should be *convict*, and so it is express in the authority here cited, *viz.* 11 Co. 29. b. for hereſy wrought no attainder, altho by 2 H. 5. cap. 7. see-simple lands were forfeited upon conviction.

(c) This is denied of a blind man, 11

Co. Rep. 29. b. & Broke in the place cited above makes a *quere* of it, because he can by no dispensation be a clerk in orders, aliter of a bastard, for he may be a priest by license.

Note no man shall be ousted of his clergy a second time by the bare mark in his hand, or by a parol averment without the record testifying it (+), and it seems, that if he deny he is the same person, issue must be joined upon it and tried to be the same person, before he can be ousted of clergy.

The orders, that come under the name of holy orders, were four, [374] viz. a bishop, a priest, a deacon, and a subdeacon; other inferior orders, as *exorcistæ*, *lectores*, *acolythi*, &c. were not called holy orders, but were called *clerici in minoribus*.

By this and some other instances, which appear in the statutes, it is evident, that the clergy in orders had a greater privilege allowed them than others.

1. A clergyman in orders in such cases, wherein clergy is ousted by the statute of 1 E. 6. cap. 12. as murder, robbery, &c. hath no more privilege than a layman, because the statute makes no exception or provision for him.

2. If a statute be made after 1 E. 6. ousting clergy generally, as the statute of 4 & 5 P. & M. cap. 4. 18 Eliz. cap. 7. a clergyman in orders hath no more privilege than another, for the statute provides not for him. *Stamf. P. C.* 135. b.

3. And therefore, tho the statute of 23 H. 8. cap. 1. and 25 H. 8. cap. 3. excluding clergy from those found guilty in petit treason, murder, robbery, &c. excepts such as are in the order of subdeacon, or any superior orders, and directs them to be delivered to the ordinary to remain in prison without purgation, or to be degraded, and then sent by the ordinary into the king's bench to be executed, it seems, that this privilege is at this day gone, 1. Because by the statute of 18 Eliz. cap. 7. all delivery of clerks convicted to the ordinary is wholly taken away. 2. Because in all those cases, where clergy is ousted by the statute of 23 H. 8. clergy is ousted by the statute of 1 E. 6. cap. 12. (except burning of houses, and accessaries before the fact, which stand within clergy by the statute of 1 E. 6. cap. 12.) and in that statute there is no saving of any privilege for clerks in orders, as there is by 23 H. 8.

And then as to accessaries before the fact clergy is likewise generally taken away by the statute of 4 & 5 P. & M. cap. 4. without saving of more privilege to clergymen than to laymen.

(+) Or a transcript thereof, for the manner of certifying which see 34 & 35 H. 8. cap. 14. and 3 & 4 W. & M. cap. 9.

4. But as to the privilege of a second allowance of clergy, it should seem at this day, clergymen in orders shall have benefit of clergy, a second, third time, or oftener.

The statute of 28 *H. 8. cap. 1.* puts clergymen in orders under the same pains and dangers in relation to the statute of [375] 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* as other persons not in orders; this takes away the privilege given by 23 *H. 8.* and 25 *H. 8.*

Then by the statute of 32 *H. 8. cap. 3.* which makes the former perpetual, it is farther enacted, “ That such persons as be within
“ holy orders, which by the laws of this realm ought or may have
“ their clergy for any felonies, and shall be admitted to the same,
“ shall be burnt in the hand as lay clerks be accustomed in such cases,
“ and shall suffer and incur afterwards all such pains, dangers, and
“ forfeitures, and be ordered and used for their offenses of felony to
“ all intents, purposes and constructions, as lay persons admitted to
“ their clergy be, or ought to be ordered or used by the laws and
“ statutes of this realm, any law or statute to the contrary notwithstanding.

This act was perpetual and subjected clerks in orders, notwithstanding the statute of 4 *H. 7. cap. 13.* to two inconveniences, *viz.* 1. To burning in the hand. 2. Exclusion of clergy a second time.

But then the statute of 1 *E. 6. cap. 12.* restores the privilege of clergy in all cases, (except those offenses contained in the statute of 1 *E. 6.* and expressly excluded from clergy,) as it was before 1 *H. 8.*

And altho by this statute of 1 *E. 6.* the burning of a clergyman in orders in the hand is not taken away by express words, yet he is restored to his clergy a second or other time, notwithstanding he had formerly his clergy and was burnt in the hand.

But altho in express words it restores not to clergymen in orders the exemption from burning in the hand given by 4 *H. 7. cap. 13.* yet it doth in equivalence, for it restores clergy in all other cases *in like manner and form, as it was before* 1 *H. 8.* which as to clergymen in orders was without burning in the hand, and accordingly to this day their privilege in that kind continues: *vide* 2 *Co. Inst.* 637. *Hob. Rep.* 294. *Searle & Williams.*

And tis a mistake to say, that if he challenge above twenty, he shall lose his clergy a second time, because the statute of [376] 1 *E. 6.* in letting loose the clergy in other offenses mentions not that case,

case, for in case of challenging above twenty, there follows neither penance nor judgment of death, but only his challenge is overruled (*).

But indeed the case of outlawry is *casus omiffus*, for tho in the clause excluding clergy the word *attainder* is in, which extends to an outlawry, yet in the second clause restoring clergy as it was before 1 H. 8. in other cases *attainder* and *outlawry* are omitted.

As to clergy of noblemen.

By the statute of 1 E. 6. cap. 12. “Peers of parliament committing felonies within clergy may pray the benefit of this act, and shall not be put to read, nor be burnt in the hand for the first offense, without any attainder or corruption of blood to be incurred thereby, and for the first offense shall be deemed, taken and used as clerks convicted, which make purgation, without any further privilege of clergy from henceforth at any time after for any cause to be allowed or admitted.

This privilege of peers to be discharged in this manner by this statute, 1. Must be prayed by them. 2. Extends to all cases, where a common person may have his clergy. 3. To all cases excepted from clergy by that statute, except murder and poisoning of malice prepenſe.

But it extends not 1. To felony put out of clergy by any subsequent statute. 2. Nor to felonies within this statute, where he cannot make purgation, as if he abjure, confess the felony, or be outlawd, by the opinion of *Stamf. P. C. fol. 130. a.* but this latter seems doubtful, especially at this day, when delivery to the ordinary and purgation are both taken away by 18 Eliz. cap. 7.

I think it was never meant, that a peer of the realm should be put to read or be burnt in the hand, where a common person should be put to his clergy, neither is it said, that he shall be discharged by his praying the benefit of this statute, where a common person [377] shall have the privilege of clergy and may make his purgation, but only where he may have the benefit of his clergy in the first clause of the statute, the other clause, (*shall be in case of a clerk convicted, that may make purgation.*) is only for his speedier discharge and farther advantage, and not to restrain the general clause.

(*) *Vide supra p. 270, 345.*

And therefore a great lawyer in the late times hath been much blamed for burning a peer of parliament in the hand, that confessed an indictment of manslaughter; and it was the only error of note, that the person erred in to my observation.

C H A P. LII.

At what time clergy is to be allowd.

ANTIENTLY the law was very unsettled in this point, till settled by subsequent acts of parliament and resolutions of the judges.

Before the statute of *Westm. 1. cap. 2.* the ordinary would challenge clerks as soon as they were indicted, nay sometimes, as soon as they were imprisond (*), before they were indicted, as appears by the statute of *Marlbr. cap. 28. (a).*

By the statute of *Westm. 1. cap. 2.* it is provided, *Que quant clerke est prise par rette de felonie & soit demand per l'ordinaire, il lui soit liuer selonque le privilege de Saint Esglise en tiel peril come il appent selonque le custome avant ces heures use*, and a direction given thereby to the ordinary, *Que ceux que sont endites de tiel rette per soleme inquest des probes hommes fait in le court le roy, en nul manner les deliverent sans due purgation, issint que roy n'ait mestier de* [378] *mettre autre remedy (b).*

After this statute the prisoner was not only to be indicted before clergy allowd, but many times inquisitions *ex officio* were taken (†).

1. Whether he were a clerk or no, and if not a clerk, he was not delivered to the ordinary. 2. Whether he were guilty or not, and if not guilty, he was discharged. 3. If found guilty, he was then delivered to the ordinary. *vide 2 Co. Inst. 164. 8 E. 2. Coron. 417. 17 E. 2. Coron. 386. 3 H. 7. 12. b.* but his goods were seised.

But this was found a great inconvenience to the prisoner, because in case of an inquest of office he lost his challenges, and besides possibly he might be quit of the felony, were he put upon the jury.

(*) *Vide Brañ. Lib. III. f. 123. b.*

(a) *2 Co. Inst. 150.*

(b) *2 Co. Inst. 162.*

(†) *Vide Part I. p. 180 in notis. p. 343 in notis, & supra p. 313. in notis.*

And

And therefore in the time of *H. 6.* the court was changed by *Prizot*, and the prisoner hath been always since put to plead to the indictment, and if convicted, then to pray his clergy: *vide 3 H. 7. 12. b. Stamf. P. Co. fol. 131. a. 11 Co. Rep. Poulter's case.*

But if the prisoner will wave that advantage and will pray his clergy, he may, for no law ousts him of it, but then, if the indictment be out of clergy, he must answer to the felony, or he shall have his penance.

But at this day clergy is never granted, unless the party confess the felony, or be convicted by verdict.

If a man be indicted of a felony within clergy, and he plead and be convicted, and it be demanded of him, what he can say why judgment should not be given against him, he may pray his clergy, tho there be no ordinary to demand him, for as shall be said in this case, the ordinary is but the minister of the court, and it is not now, as antiently, used for the ordinary to demand a prisoner, but he may pray his clergy himself.

If in that case the ordinary demand not the prisoner, nor the prisoner himself prays his clergy, yet if it appear to the court, that he is a clerk, or be so named in the indictment or appeal, the court [379] may, and it seems ought *ex officio* to allow him his clergy, but howsoever they thought not to execute him. *22 E. 3. Coron. 254. Abridg. Affiz. 74. (c).*

If by any mistake or oversight the court should give judgment against him, yet they may, (and as I think,) ought to allow him his clergy after his attainder.

And therefore the prisoner condemned shall in such a case be allowed his clergy under the gallows, if the judge come that way, *34 H. 6. 49. a. b.* This is agreed may be done by the judges of the king's bench, as justices of peace, because their commission continues, but it is doubted, how it can be done by justices of *oyer and terminer* after their session ended. *Crompt. Just. 119. a.*

And it is true, that tho they may allow clergy during the adjournment of their commission, yet they cannot do it after their session is over, but they may reprieve him after judgment, notwithstanding their session determined, upon consideration that he can read, and then may allow him his clergy as a clerk attaint at the next session. *3 & 4 Eliz. Dy. a.*

(c) This case is in *12 Affiz. 15.*

A. is indicted of a felony within clergy, and hath his book delivered him but cannot read, and the ordinary returns accordingly *non legit*, and it is entered of record *non legit*, and the court reprieves him till another sessions, and by that time he hath learned to read, tho the gaoler, that taught him to read in the mean time, was antiently punishable, yet he shall be admitted to his clergy and be delivered. 27 *Affiz.* 44. n. 11. *Dy.* 205. a. b. *per omnes justiciarios*, *Dy.* 214. b. *Stone's case.*

And the same law it is, if judgment of death were entered against him upon *non legit* returned, yet if he can read after, he shall be delivered to the ordinary and have his clergy *per omnes justiciarios*. 34 *H.* 6. 49. *Coron.* 20 (*).

If a man abjure the kingdom, (which is an attainder in law,) and come back again, he shall have the privilege of his clergy, as a clerk attaint. 8 *H.* 6. *Kelw.* 186. b. *Rast. Entr. fol.* 1. b.

But in antient time he was not delivered to the ordinary, but remanded to prison till he obtained the king's pardon for [380] returning into the kingdom without licence, and that being obtained he should be delivered to the ordinary, 1 *E.* 3. 16. b. *Coron.* 155. *Stamf. P. C. Lib.* II. cap. 50. but this law is antiquated: *vide Rast. Ent. fol.* 1. b. *ex T.* 15 *H.* 7. *rot.* 2.

If a man indicted of a felony within clergy stands mute, yet he shall have his clergy. *Moore's Rep.* n. 738. p. 550. *Winter's case*, yea tho judgment of *peine fort & dure* were given against him, if the case, as it appears upon the indictment, be within clergy, for the court in this case ought to be of counsel with the prisoner *in favorem vite*, tho he be wilful.

If the approver disavow his appeal, or be vanquished in battle, or become recreant therein, yet he shall have the privilege of clergy, if the cause, for which he is indicted, be within clergy.

But in these cases of attainder antiently they were delivered to the ordinary *absque purgation*. 15 *H.* 7. *Rast. Ent.* 1. b.

(*) These points cannot now come in question, for the necessity of reading is entirely taken away by 5 *Ann.* cap. 6.

C H A P. LIII.

Concerning the manner how, and the judge by and before whom clergy is to be prayed or allowed.

ANTIENTLY the ordinary took upon him, as the person that was to judge of the competency or incompetency of the clerk. But in truth the king's justices were the judges both touching the competency of the clerk to be admitted, and the sufficiency or insufficiency of his performance therein, and the ordinary was in truth but the minister to the court. 5 *Co. Rep.* 26. *b. case of ecclesiastical law (a).*

If the ordinary had challenged one as a clerk, that the court judged not to be such, the ordinary or bishop should be fined, and his temporalities seised, 7 *H.* 4. 41. *b. Stamf. P. C.* 132, 133, and the felon shall be hanged. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.*

Again, if the ordinary refuse one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read sufficiently, the prisoner shall be saved notwithstanding the refusal and return of the ordinary, and accordingly, if the ordinary be absent, the court may give him his book. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.* 7 *H.* 4. 41. *b.* 34 *H.* 6. 49. *a. b. Stamf. P. C. Lib. II. cap. 45. fol.* 132, 133.

And therefore the judge may and usually doth appoint the verse, that the clerk shall read, *Stamf. P. C. ubi supra*, and therefore the practice of *Bryan and Starkey*, 21 *E.* 4. 21. is justly reprobable, who when they delivered a book to the prisoner and he read well in the presence of the justices, yet when the ordinary returned *non legit*, gave judgment of death against the prisoner, for in truth the ordinary is but the minister, or at most the assistant to the court, and not the judge. *Hob. Rep. p.* 290. *Searle & Williams (b).*

(a) *Vide Kel.* 28. 51.

(b) But this learning is now out of use, for by 5 *Ann. cap.* 6. every person convicted of a felony within the benefit of clergy shall, upon praying the benefit of that statute, without any reading, be allowed to be, and be punished as a clerk convicted, and this shall be as effectual and advantageous to him, as if he had read as a clerk.

C H A P. LIV.

Concerning the consequences of clergy granted or prayed.

THE consequences or effects upon clergy granted are considerable in two ways, 1. What they were before the statute of 18 *Eliz.* and 2. What since.

Touching the consequences of clergy before the statute of 18 *Eliz.* they were these

I. Regularly when clergy was granted, there was an entry made by the court of king's bench, *Et tradito ei hic per curiam libro legit ut clericus, & J. S.* (the ordinary or his deputy,) *petit ipsum, ut clericum, præfato ordinario deliberari, ideo consideratum est, quòd prædictus A. B. liberetur præfato ordinario.* And if it be without purgation, then there is this added, *salvo custodiend' absque aliquâ purgatione inde de cætero faciend' sub periculo, quod incumbit.* 17 *H.* 7. *Rot.* 2. *Rast Entries* 121. *a.* But if it be not without purgation, then that clause is omitted.

This is the form of the award in the king's bench, but before justices of gaol-delivery the entry commonly is, *Et traditur ordinario*, either generally or *absque purgatione*, as the cause requires. *M.* 2 & 3 *Eliz.* *Dy.* 205. *b.* & *ibid.* 215. *a.*

II. When he was so delivered to the ordinary, he was to remain in the ordinary's prison; *viz.* if committed generally, then he was to remain till he had made his purgation, if *absque purgatione*, then he was to remain there during his life, unless the king pardon him,

And if the clerk had broke prison, this was not a felony within the statute of 1 *E.* 2. *de frangentibus prisonam* (*); but if the clerk were attaind and delivered to the ordinary and broke prison and escaped, and were after taken, he should have been executed [383] upon his first attainder, *quod vide* 27 *Affiz.* 42.

But by the statute of 23 *H.* 8. *cap.* 11. if such a clerk break the prison of the ordinary and escape, this is made felony without clergy; only the clerk, if in orders, being convict was to be delivered to the ordinary without purgation, and he might, if he pleased, degrade him and send him into the king's bench with letters signifying his degra-

(*) Because that statute was construed to extend only to the king's prison: *vide Part I. p.* 608.

ding, and that court, have the record of the conviction before them, might give judgment and award execution, as if he had been a layman and found guilty before them.

But this among the rest of the felonies enacted in the time of *H. 8.* was repealed by 1 *E. 6. cap. 12. & 1 Mar. cap. 1.*

III. If the clerk were committed generally, he might make his purgation (*), the form whereof is unnecessary to recite, being it is now taken away by 18 *Eliz.* and is fully described and directed by *Stamford Lib. II. cap. 48. fol. 138.* and the statutes of *Westm. 1. cap. 2. 4 H 4. cap. 3.*

And if the ordinary would not admit a clerk to his purgation, a writ might issue out of the chancery to command it, where by law it might be done. 15 *H. 7. 9. a. per Fincux.*

And when he had made his purgation, he had always restitution of his lands seized, unless he were attaint. 8 *E. 2. Forfeiture 34.*

But as touching goods the difference was thus :

If before conviction upon his arraignment the prisoner had his clergy, (as was used commonly before the time of *H. 6.*) then if he made his purgation, upon signification thereof to the chancery he had a writ to the sheriff to restore him his goods, *nisi eâ de causâ fugam fecerit*, for then he had no restitution, *F. N. B. 66. a.* but if he died before purgation, his executors could not have it.

But if he had pleaded to inquest, and were convicted, then the goods were forfeited by the conviction, and he should not have restitution of his goods upon his purgation, and altho the law was taken antiently, that even in case of a conviction, unless there were an attainder also by judgment, he should upon his purgation have had restitution. 3 *E. 3. Coron. 265. 40 E. 3. 42 a.* yet of latter times the law hath constantly obtained otherwise, as appeareth 8 *H 4. 2. a. 20 E. 1. 5. B. Coron. 166. Plow. Com. 262. b. Stamf. P. C. Lib. III. cap. 23. vide 3 E. 3. Coron. 332.*

And the same law seems to be, if he come not in upon the exigent awarded, if he fled, if he stood mute, or challenged above thirty-five, for in all these cases he forfeited his goods, and should not have restitution upon his purgation, *vide 8 E. 2. Coron. 417.* where, tho he prayed his clergy before conviction, yet upon an inquest of office find-

(*) This was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was discharged : if found guilty, he was degraded.

ing him guilty he forfeited his goods; the like *H. 17. E. 2. B. R. rot. 87. Heref.* in the bishop of *Hereford's* case before cited *cap. 11. p. 326.*

But if the clerk were delivered to the ordinary *absque purgatione*, there he continued prisoner during his life, unless pardoned by the king, and the king had not only his goods, as absolutely forfeited, but also the profits of his lands during his life, as appears by the books above cited.

And if the clerk were so delivered *absque purgatione*, if the ordinary went about to admit him to purgation, a writ might issue out of the chancery to prohibit him. *Claus. 22 H. 3. m. 17. dorso, Episcopo Exon. H. 14. E. 3. B. R. rot. 19. Lond'* and he shall for it be fined, and his temporalties seised for the contempt, and by some books it is an escape in the ordinary. *9 E. 4. 28. a.*

There were certain cases, wherein the clerk was delivered to the ordinary *absque purgatione*. 1. Where he was outlawed of felony *23 H. 8. cap. 1. Rash. Entries 121. a.* 2. Where he confessed the felony either upon his arraignment, or become an approver, or confessed and abjured and after came into the realm again, for against his own confession he should not be admitted to purge himself of the crime he confessed. *3 H. 7. 12 a.* 3. If he had judgment given against him, whereby he was attaint. *10 E. 3. Coron. 247.* 4. If he were in orders and broke the prison of the ordinary and made [385] his escape, by the statute of *23 H. 8. cap. 11.* 5. Where a man in orders was convicted of any of the felonies ousted of clergy by *23 H. 8. cap. 1.* he was to remain during his life without purgation, and the ordinary might degrade him and send him into the king's bench to receive judgment. 6. If he were only convicted by verdict in an appeal, he should not make his purgation. *12 R. 2. Coron. 109. 10 E. 2. Coron. 217.*

IV. If a felon had his clergy, regularly he was never to be arraigned again before the king's justices for the same felony, unless it were in case where he broke the prison of the ordinary and escaped. *20 E. 2. Coron. 232. (a).*

V. If a clerk had his clergy for felony, he was not to be arraigned for any other felony by him committed before his clergy allowed, for by the statute of *25 E. 3. cap. 5. pro clero*, it is enacted, "That he

(a) For in that case *ecclesia iussum tueri non debet*, vide *Bracton, Lib. III. de coron. c. 2.* f. 131. a.

"shall be arraigned of all his felonies at once (*b*)," yea and altho he only prayed his clergy, tho there be no entry of record, that he read or was delivered to the ordinary, yet by force of this statute he shall not be arraigned of any felony committed before, for the first felony being within clergy, and he praying his clergy, it was the fault of the court, that he had it not, which shall not turn to his disadvantage. *T. 4 Eliz. Dy. 214. b. Stone's case.*

Yet this hath some exceptions, for if he had committed treason against the king before his clergy admitted, he may after his clergy and after his purgation also be indicted and arraigned for that treason, because it was an offense not within benefit of clergy.

VI. If he had committed a felony after he had his clergy, and was delivered to the ordinary, he should be put to answer that felony, *vide 4 Eliz. Dy. 214. b.* and if he had killed his keeper and thereby escaped [386] of the ordinary's prison, he should not for that felony have had his clergy for it, *frustra legis auxilium querit, qui in legem committit.* 8 E. 2. Coron. 419. 22 E. 3. Coron. 250.

The case of *Stone*, 4 *Eliz. Dy. 214. b.* was this.

Stone committed two felonies the same day, one (suppose it burglary) out of clergy, the other (suppose it larceny) within clergy, he is indicted of the larceny, he pleaded and was convicted, and prayed his clergy, and entered *non legit ut clericus*, and no judgment, *quod tradatur ordinario*, but is reprieved without judgment to another sessions, at which he is indicted of the other felony out of clergy, but supposed to be the same day when the former felony was committed, he is arraigned and pleads *non culp*, and is found guilty, & petit librum & legit ut clericus, sed non crematur, neque traditur ordinario.

1. It was agreed, that this second reading, notwithstanding the *non legit* first entered, is a good discharge of the first felony within clergy per omnes iusticiarios, *Dy. 205. a. b.* but then, 2. The question was, what should be done as to the second not within clergy, whereof he was indicted and convicted: by seven justices he shall have judgment to die, because it shall be intended a felony committed after the first arraignment, but by other seven he shall be discharged, for it shall be intended a felony committed the same day, as it is laid, and tho there be no award, *quod tradatur ordinario*, yet that was the act of the court

(*b*) This statute was only in affirmance of the common law, for he was to be degraded by the ordinary, and this was

thought a sufficient punishment for all offenses committed before degradation; *vide Erulston Lib. 111. de coronâ, cap. 9. f. 123. b.*

and shall not prejudice him; but he shall be adjudged in the custody of the ordinary from the first prayer of his clergy.

But afterwards 23 *Maii* 8 *Eliz.* he was indicted for murder committed the first of *April* 1 *Eliz.* and was convicted and had judgment, and was executed, and yet that murder was before his clergy prayed, and before the statute of 2 *Eliz. cap.* 4. therefore it seems the former opinion obtained, for if he had been discharged by his reading as to the felony, whereof he was first indicted, he must have been discharged of all felonies committed before his first arraignment. The only false that I can think of is either, 1. That he should have *pleaded* it, and did not; or 2. That the *legit ut clericus* must be intended to be applied to the second felony only, and not to the first, [387] whereupon *non legit* was entered. *Dy.* 215. a.

And thus far touching the effect of clergy, as it stood before 8 & 13 *Eliz.*

By these two statutes two great alterations were made in the whole business of clergy, which took away many of those intricate questions, tedious proceedings, and great inconveniencies, that were therein before this time.

1. By the statute of 3 *Eliz. cap.* 4. it is enacted, “ That every
“ person, which shall hereafter upon his arraignment for any felony
“ be admitted to the benefit of clergy by the laws of this realm, and
“ delivered to the ordinary for the same, and shall make his due purgation for the same offense or offenses, whereupon he was so admitted
“ to his clergy, and shall before his admission to his clergy have committed any other such offense, whereupon clergy by the laws or
“ statutes of this realm is not allowable, and not being thereof before
“ indicted and acquitted, convicted, or attainted, or pardoned shall
“ and may be indicted or appealed for the same, and thereupon put to
“ answer, and ordered and used in all things according to the laws
“ and statutes of this realm in such manner and form, as tho no such
“ admission to clergy had been.

By this statute, tho all other felonies within clergy before clergy admitted stand discharged, as they were at common law, yet felonies out of clergy committed before clergy allowed may still be prosecuted, notwithstanding clergy allowed, and so as to so much it repealed the statute of 25 *E. 3. pro clero, cap.* 5.

Then at the parliament of 18 *Eliz. cap.* 7. it is enacted, “ That
“ every person, which at any time hereafter shall be admitted at a il-

“lowed to have the privilege of clergy, shall not thereupon be delivered to the ordinary, as hath been accustomed, but after such clergy allowed, and burning in the hand according to the statute in that behalf provided, shall forthwith be enlarged and delivered out of prison by the justices, before whom such clergy shall be granted, [388] “that cause notwithstanding, provided, that the justices may “for farther punishment detain the clerk in prison for any “time not exceeding one year (c).

“Provided that, if any one shall be convicted of carnal knowledge, “and abusing a woman child under ten years, such offense shall be “felony without clergy.

“Provided, that any person admitted to the benefit of clergy shall “notwithstanding the same be put to answer other felonies, whereof “he shall be indicted or appealed, not being thereof before acquitted, “convicted, attainted, or pardoned, and shall in such manner be arraigned, tried, adjudged, and suffer such execution for the same, as he or they should have done, if as a clerk or clerks convicted they had “been delivered to the ordinary, and there had made his or their due “purgation.

Upon this statute these points are clear.

1. That if before his clergy admitted, he had committed any other felony within clergy, he is cleared of them as well as of that whereupon he hath his clergy, for his burning in the hand is in lieu of his delivery to the ordinary and purgation.

2. That as to former felonies out of clergy he is not discharged by his admission to clergy, but shall be put to answer them.

3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithstanding his burning in the hand.

(c) By 5 Ann. cap. 6. it is enacted, “That where any person shall be convicted “of larceny the judges shall award him to “the work-house or house of correction, “there to be kept without bail at the discretion of the judges, not less than six “months, nor more than two years from “the conviction: an entry whereof is to be “made on record, and if such offender “escapes he shall be committed to such “house where to remain not less than “twelve months, nor more than four “years.

By 4 Geo. 1. cap. 11. and 6 Geo. 1. cap. 23. “The court may order any person “convicted of larceny, or any felonious “stealing of money, &c. within clergy, “except persons convicted for receiving

“stolen goods, knowing them to be stolen,) “instead of being burnt in the hand or “whipt, to be transported to any of his “Majesty’s plantations in America, for “the space of seven years; and persons “convicted for receiving stolen goods, knowing them to be stolen, or for offenses “without clergy, but pardoned generally “upon condition of transportation, to be “transported for the term of fourteen “years; and if any shall rescue or aid “such offender to make his escape, or if “such offender shall return or be found at “large without leave before the expiration “of his term in Great Britain or Ireland, “he or they shall be deemed guilty of “felony without clergy.

4. That

4. That yet by his burning in the hand he is put into a capacity of purchasing and retaining other goods, because the statute taking away delivery to the ordinary and purgation, which should have restored him to that capacity, gives him the capacity of purchasing and retaining other goods, and is in nature of a pardon.

5. That presently upon his burning in the hand he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof.

6. That altho he be not burnt in the hand, but the king pardons it, he is thereby put into the same condition, as if he were burnt in the hand, and rendered a person capable now to purchase and retain goods, altho the words of the statute are *after clergy allowed and burning in the hand he shall be delivered*. These are all points resolved in 5 *Co. Rep.* 110. *a. Foxley's case*, and *P. 41 Eliz. Heston's case* therein cited (*).

7. And consequently after clergy and burning in the hand he shall not be proceeded against by the ecclesiastical judge to deprivation or other ecclesiastical censure, for it amounts to a pardon by the king. *Hob. Rep. p. 288. Scarle & Williams*.

8. That notwithstanding this statute requires burning in the hand to discharge a clerk convict, yet a clerk in holy orders, viz. in the order of subdeacon or above shall not be burnt in the hand, but the privilege allowed them by the statute of 4 *H. 7. cap. 13.* to be saved from burning in the hand continues to them. 2 *Co. Inst.* 637.

9. And upon the same account they may have their clergy in cases within clergy a second time according to the statute of 4 *H. 7. cap. 13.* notwithstanding this statute.

10. That altho a clergyman in orders shall not be burnt in the hand, yet by virtue of the statute 4 *H. 7. cap. 13.* and of this statute after his discharge given by the court he shall have the same privilege as if he had been burnt in the hand, and therefore shall not be drawn in question in the ecclesiastical court to deprive him or inflict any ecclesiastical censure upon him. *Hob. Rep. 288. Scarle & Williams*.

11. That notwithstanding this statute takes away delivery to the ordinary, and inflicts burning in the hand, yet the [390] privilege of peers of parliament exempting them from reading and burning in the hand for the first offense is not hereby at all diminished or altered.

(*) *V. de sup. p. 278.*

12. That the plea of *autrefois convict* and had his clergy stands as a good bar to a new arraignment for the same felony, as it did before this statute.

13. That if a man be indicted of murder, and upon not guilty pleaded is found guilty of manslaughter, and prays his clergy, tho he neither be burnt in the hand, nor hath his clergy allowed, but the court will advise upon it, yet this stands as a good bar to a new indictment or appeal for the same felony, for the prisoner hath done what he can in praying his clergy, which prayer is recorded *petit librum*, and it is the act of the court to advise, and their delay in allowing him clergy, or burning him in the hand shall not prejudice the prisoner. 4 *Co. Rep.* 45. *b.* *Wigg's case* and *Holcroft's case* adjudged. *Co. P. C. cap.* 57. *p.* 131. (*d*).

(*d*) This point was however much litigated, and at last solemnly settled in the case of *Armstrong* and *Lisle T.* 8 *W.* 3. *B. R. rot.* 565. *Kel.* 93. that a conviction of manslaughter, and that he was a clerk and

ready to read, if the court would have allowed him, is a good bar to an appeal, altho the court had not called the defendant to judgment, but continued him over with a *curia advisare vult*.

[391]

C H A P. LV.

Concerning judgments in the several kinds of capital offenses.

HAVING now gone through the preparatories to judgment, namely indictment, pleas, trial, and clergy, I come to consider of the judgments that are to be given in several capital offenses, and therein, 1. I will consider the several kinds of judgments. 2. Who are the judges, that may give them. 3. How and in [what manner.]

First, for the several kinds of judgments I shall consider these particulars.

1. What judgment is to be given in case of an acquittal of any capital offense.

2. What, when clergy is allowed.

3. What to be given against a person convicted of treason, as against the king.

4. What to be given in case of petit treason.

5. What, in case of felony.

6. What, in case of *peine fort & dure*.

I. The

I. The judgment upon the acquittal of the prisoner is either when he is acquitted by special plea, as of *autrefoits acquit*, or of a pardon, &c. or other matter in bar, or else when he is acquitted upon not guilty pleaded; and of these in their order.

If the prisoner pleads the king's pardon, the conclusion of his plea is ordinarily thus, *quarum quidem literarum domini regis (ac dicti brevis* if there be a writ of allowance also pleaded,) *prætextu prædictus T. H. petit quòd ipse de præmissis per curiam hinc dimittatur, &c. super quo visis & per curiam hinc intellectis omnibus & singulis præmissis consideratum est, quòd prædictus T. H. eat inde sine die, &c.* and in the margin of the roll there is commonly entered *literæ patentes allocantur: sine die, &c.* and no other judgment is usually entered in such case. *Rust. Entries 455. a. b.* [392]

If the prisoner pleads *autrefoits acquit*, or *convict*, or *attaint de mesme felony*, and avers it to be the same, (as he must,) the conclusion of his plea is, *& hoc paratus est verificare, unde petit iudicium, & quòd ipse de præmissis per curiam hinc dimittatur*, and sometimes and most commonly pleads over to the felony not guilty.

Et David Waterhouse armiger. coronator & attornatus domini regis in curiâ ipsius regis coràm ipso rege, qui pro eodem domino rege in hac parte sequitur, pro eodem domino rege dicit & cognovit, quòd prædictus Johannes Sayer, qui modo comparet, & prædictus Johannes in inquisitione prædictâ nominatus per nomen Johannis Sawyer, nuper de W. in com. S. &c. est una & eadem persona, and so goes along to all the averments modo & formâ, prout prædictus Johannes Sayer superius placitando allegavit, super quo visis & per cur' hinc intellectis omnibus singulis præmissis tam in placito prædicto ipsius Johannes Sayer in formâ prædictâ placitat' & accords convictionis prædict. quàm dicti domini regis attornati ejusdem placiti cognitione, consideratum est, quòd prædictus Johannes Sayer eat inde sine die H. 5 Jac. B. R. Sayer's case, where he pleaded *autrefoits convict* and had his clergy.

And judgment is in like manner entered, H. 6. Jac. B. R. in the case of Francis Smith upon *autrefoits acquit* pleaded, *Et* David Waterhouse armiger, qui pro domino rege in hac parte sequitur, viso placito prædicti Francisci Smith & diligentèr per ipsium examinat' præmissis, pro eo, quòd evidentèr & manifestè apparet eidem David Waterhouse, quòd placitum prædictum per præfatum Franciscum superius placitatum &c. hoc non dedit sed placitum illud ex parte dicti domini regis in omnibus fateatur, & cognovit fore verum: Idè ut supra eat sine die.

The like form of judgment, viz. *quòd eat sine die* was antiently used in case of *autrefoits acquit* pleaded. 2 E. 4. *John Hodgson's case*.

And note, this judgment of *eat sine die* is of two kinds, sometimes it is special, sometimes it is general.

[393] If *A.* bring an action of covenant against *B.* and a special verdict is found, but upon the perusal of the declaration a fault therein appears, *Et quia videtur curiæ, quòd narratio est insufficiens, consideratum est quòd querens nihil capiat per billam, sed quòd defendens eat inde sine die*, this judgment shall not be a bar in another action; because special, and not given upon the verdict, but upon the insufficiency of the declaration; otherwise it had been, if given generally, for it should have been intended upon the verdict and merits of the cause. *T. 1650. Eales & Lambert (a).*

In a *quare impedit* by the king issue is joined and found for the defendant, at the day in bank it is alleged in arrest of judgment, that no patron is named in the writ, the judgment shall be entered generally, *quòd eat sine die*, and not specially upon the plea in abatement, but it seems, it shall not bar the king in a new action, for the *eat sine die* shall be applied to the plea to the writ: *vide 3 H. 4. 2 & 11. (b).*

But it seems, that if a man pleads a plea in bar of the indictment, as *autrefoits acquit*, or a pardon, yet if the indictment be insufficient, upon the reason of *Vaux's case 4 Co. Rep. 45. a.* the *eat sine die* shall be applied for the advantage of the king to the insufficiency of the indictment, and not to the plea in bar; *quære tamen, non obstante Vaux's case.*

It is reason to have the *eat sine die* special in that case, *et quòd indictmentum prædictum apparet minus sufficiens, idèd consideratum est, quòd eat sine die*, and then it is applicable only to the insufficiency of the indictment.

(a) This case (but not this point) is reported in *Str. 375, 54 & 75.*

(b) This case, which is obscurely stated by our author, appears from the year-book to have been thus. A *quare impedit* was brought by the king, and a verdict was found for the defendant, upon which the defendant prayed judgment, but the counsel for the king denied, that the writ might abate, because it was brought against the incumbent only, and not against the patron, but this was refused, because the king was estopped from abating his own writ; then they prayed, that if judgment were entered

against the king, the cause thereof should likewise be entered, but this also was refused by the court as needless, and the judgment entered generally, *quòd defendens eat sine die*, (the same judgment, that should be in case the writ had been brought against the patron and incumbent, and it had been found against the king,) because the king will receive no prejudice thereby, for if this judgment should afterwards be pleaded in bar, the king might reply, that judgment was given against the writ, because the patron was not named therein.

If a man plead not guilty and is acquitted, antiently the judgment was not only, *quòd eat sine die*, but *ideò consideratum est, quòd eat inde quietus*, tho it were at the king's suit, *quòd vide Rast. Entries 51. a. 2 E. 4.* in the case of *Hodgson* before cited, and so in the case of *Smith* before cited, *viz. H. 6 Jac.* and accordingly *H. 3 Jac. B. R. Rast. Entries 57. Ideò consideratum est, quòd idem T. sit inde quietus, & eat sine die. Rast. Entries, fol. 385. Gosl-delivery 6, 7, 10, 11.*

Yet at common law without the aid of 18 *Eliz.* he might be bound bound to his good behaviour, if it were testified he was of ill fame, and shall be committed till he find sueties. *Rast. Ent. 385. Gosl-delivery 5.*

And if the entry were such, I do not think the prisoner could ever be arraigned again notwithstanding the insufficiency of the indictment, till that judgment of acquittal were reversed, for *eat inde quietus* cannot go to the insufficiency of the indictment, but must go to the matter of the verdict.

But indeed in *Vaux's* case, 4 *Co. Rep. 44. a.* who was acquit by verdict upon not guilty pleaded, the judgment is only *Ideò consideratum est, quòd prædictus Willielmus Vaux de feloniam & murdro prædicto in indictmento prædicto superius specificat. necnon de dictâ feloniam venenatione prædicti Nich. Ridley in eodem indictmento nominat. eidem Willielmo imposit. eat sine die*, not *eat inde quietus*: he was afterwards indicted *de novo* and pleaded the former acquittal, and yet because the indictment was not sufficient, he was put to plead to the felony, and had judgment and was executed.

The truth is the best reason to maintain that judgment is that, which is given by my lord *Coke P. C. 214.* in these words, *In the case of acquittal the judgment is, quòd eat sine die, which may be given as well for the insufficiency of the indictment, as for the party's innocence or not guiltiness of the offense, and the judges of the cause ought before judgment to look into the whole record, and upon due consideration thereof to cause it to be entered, ideò consideratum est, quòd eat sine die.*

This is the best reason to support that judgment, but if the judgment had been, *quòd eat inde quietus*, as the antient form is in case of acquittal upon not guilty pleaded, that could never refer to the defect of the indictment, but to the very matter of the verdict; and if in *Vaux's* case the judgment had been so entered, he could never again have been indicted for the same offense, notwithstanding the

the defect of the indictment, till that judgment reversed by writ of error, tho, as it was, that judgment in *Vauxe's* case was one of the hardest that ever I met with in criminal causes, for where the prisoner excepts to the insufficiency of the indictment, or the court doth it *ex officio*, the judgment is special, *quòd indictmentum ob insufficienziam cassetur, & quòd the prisoner eat indè ad præsens sine die.*

If a man be indicted of homicide *se defendendo*, or *per infortunium*, he must plead to it or confess it, and there is no judgment of death given against him, but *remittitur prisonæ*, or bailed *ad expectand. gratiam regis.*

But if a man by the coroner's inquest be found to have kild a thief, that assaulted him to rob him or to commit a burglary, which is not felony, he shall neither be arraigned nor put to answer upon that indictment, but shall be dismissed without any judgment.

But if he had been indicted of murder or manslaughter, and upon *not guilty* pleaded the special matter is found, or the jury acquits him, the judgment shall be *quod eat indè quietus*, and it is a perpetual discharge; and if he be found guilty *se defendendo*, yet the judgment given thereupon, *quod expectet gratiam regis* is a perpetual bar to another indictment. *Co. P. C. cap. 101. p. 213, 214.*

II. The judgment in case of allowance of clergy is thus, *Super quo actunc & ibidem quæsitum est per cur. domini regis de eodem Johanne, si quid pro se habeat vel dicere sciat, quare curia domini regis hic ad iudicium & executionem de eo super veredictum prædictum procedere non debeat; idem Johannes dicit, quòd ipse est clericus, & petit beneficium clericale sibi in cā parte allocari, & tradito eidem Johanni libro idem Johannes legit ut clericus, super quo consideratum est per curiam hic, quòd idem Johannes in manu suā lævā cauterizetur & deliberetur*, and the execution is accordingly enterd, *& instantè crematur in manu suā lævā, & deliberatur juxta formam statuti.*

[396] And if he be a nobleman, and be demanded wherefore judgment should not be given upon the verdict, he may aver, that he is a peer of the kingdom *habens locum & vocem in parlamento*, and pray the benefit of the statute of 1 E. 6. cap. 12. and if it appear so in the indictment, or in case it do not, if the court be ascertained thereof either by writ of *certiorari* to the clerk of parliament, or if it be confessed by the king's attorney, then the judgment is *idèò consideratum est quòd deliberetur secundum formam statuti in hujusmodi casibus edit. & provis.*

And if it be alleged, that he is a clerk in holy orders, then it shall be entered after his reading, *Et quia curiæ hic constat per certificationem Episcopi, &c. or per literas testimoniales Episcopi, quod ipse est clericus in sacris ordinibus constitutus, viz. in ordine subdiaconatus, ideo considerat. est per curiam, quod deliberetur secundum formam statuti in hujusmodi casu edit. & provis. sine cauterizatione* And the like, if he pleads the king's pardon of burning in the hand.

And if a layman pray his clergy, and it appear of record, that he had it before, then the entry is, *Et quia per inspectionem recordi coram domino rege hic missi &c. quod aliter idem J. S. indictatus existit &c.* setting out the effect of the record, *& quod ipse est eadem persona, & hoc idem J. S. non dedicit, ideo consideratum est, quod privilegium clericale eidem J. S. non allocetur, & quod suspendatur per collum quosque &c.*

And so if he prays his clergy, [and cannot read,] *Et tradito ei per curiam libro idem J. S. non legit ut clericus, ideo considerat' est, quod suspendatur per collum, quousque mortuus fuerit.*

III. The judgment in high treason against the king for conspiring his death, or levying war, or for a priest upon the statute of 27 Eliz. cap. 2. or for any new treason made by authority of parliament is in this manner.

First the king's serjeant or attorney *juxta debitam legis formam petit versus ipsum E. D. super veredict' prædict' judicium & executionem pro dicto domino rege habend.' &c.* but this is not of absolute necessity, for the court *ex officio* ought to give judgment.

Et super hoc visis & per curiam hic plenius intellectis omnibus & singulis præmissis considerat' est, quod prædictus E. D. [397] ducatur per vicecomitem com' Middlesex, or per marescallum hujus curiæ, or per constabular' turris London usque marescalciam &c. or usque turrim London, or usque gaolam domini regis com' prædicti (according as the prisoner is in custody,) Et de inde per medium civitatis London directè usque ad furcas de Tiburne trahatur, & super furcas illas ibidem suspendatur, & vivus ad terram prosternatur, & interiora sua extra ventrem suam capiantur (c) ipsoque vivente (d) comburantur, & caput ejus amputetur, & corpus ejus in quatuor partes dividatur, & caput & quateria illa ponantur ubi dominus rex ea assignare voluerit.

(c) *Secreta membra amputentur* is here sometimes inserted, *Sborw. cases in parliament* p. 187. but it is not of necessity, vide the sentence in lord *Derwentwater's* case, *Stat. Tr. Vol. VI. p. 16.*

(d) These words *ipsoque vivente*, or others tantamount are absolutely necessary, otherwise the judgment is erroneous. See 2 *Salk.* 632. *Sborw. cases in parliament* p. 127. *Rex versus Wakot.*

But if the prisoner be in the king's bench and the judgment be given in that court, the entry is *quòd prædictus J. S. ducatur per prædictum marescallum usque prisonam marescalciæ domini regis coram ipso rege, & de inde ad quendam locum executionis, vocat. St. Thomas Wateringes, trahatur, & supra furcas ibidem suspendatur*, and so forward as in the judgment.

Thus the judgment was entered against *Barkly* a feminary priest upon an indictment in *Middlesex*, *P. 38 Eliz.* upon the statute of *27 Eliz.* But the judgment against a woman in all cases of high treason is to be drawn and burnt. *Co. P. C. 211.*

Upon an indictment of treason for counterfeiting the king's coin the judgment is only, as in petit treason, *viz. quòd ducatur usque goalam domini regis de Newgate per vic' com' Middlesex, & ab inde usque ad furcas de Tiburn trahatur & ibidem suspendatur, quousque mortuus fuerit.*

And the judgment against a woman is also, as in petit treason, to be burnt. *25 E. 3. 42. (c).*

This is agreed of all hands, but as to clipping or impairing of coin [there hath been some doubt,] and likewise as to counterfeiting of foreign coin made current by proclamation, because these are new created treasons. *Co. P. C. p. 17.*

But yet in cases of clipping or washing made treason by [398] the statute of *5 Eliz. cap. 11. & 18 Eliz. cap. 1.* the judgment is now settled to be only drawn and hanged, as in case of counterfeiting of the coin of the kingdom by *25 E. 3. de proditionibus*, and this was agreed, and accordingly judgment given against two *Frenchman, Hill*, *25 Car. 2. (f)*, according to the book of *T. 6 Eliz. Dy 230. b.*

And with this agrees the resolution of *24 H. 8.* in justice *Spilman's* reports cited *2 Co. Inst. p. 636.* A priest drawn and hanged for clipping the king's coin, and yet clipping was not held to be treason within the statute of *25 E. 3.* but made so [by the statute of *3 H. 5. cap. 6.* according to the common opinion and the recital of the statute of *5 Eliz.*] (*g*), and so repealed by the statute of *1 Mar. cap. 1.* yet even while that statute of *3 H. 5.* was in force, the judgment was only drawing and hanging in that case.

(c) *N. Edit. 85. b.*

(f) *Bellw & Norman, 1 Ven. 254.*

(g) In the original MS. the words in this place are, *By the statutes of 5 & 18 Eliz.* according to the common opinion and the

recital of those two statutes: but it appears by what follows, that the statute of *3 H. 5.* was intended here to be mentiond, nor is it recited in the statute of *18 Eliz.* but only in that of *5 Eliz.*

And upon search of precedents both in the king's bench and at the *Old Baily*, tho some precedents were of hanging drawing and quartering for clipping, yet the most usual were only drawing and hanging (*h*).

And upon the same reason I think, that in case of counterfeiting of foreign coin made current by proclamation, made treason by the statute 1 *Mar. cap. 6.* and the clipping or washing thereof, likewise made treason by 5 and 18 *Eliz.* I think there ought to be no other judgment but drawing and hanging, for by the proclamation and the act of 1 *Mar.* it is now become as the coin of this realm, and it were an incongruous thing for a man to be hanged and quartered for counterfeiting foreign coin made current by proclamation by interpretation of the statute of 1 *Mar.* and yet to be only drawn and hanged for counterfeiting the proper coin of the kingdom.

For counterfeiting the great or privy seal certainly there was antiently no other judgment but that of petit treason, namely drawing and hanging, as appears by the book of 2 *H. 4.* [399] 25. *a. (i)*, and the record of that case, tho my lord *Coke* excepts against it in *P. C. p. 15. sed de his vide quæ supra dixi Part I. cap. 16. p. 187.*

IV. The judgment in petit treason is for a man to be drawn and hanged, for a woman to be drawn and burnt, as also in high treason, *Co. P. C. p. 211.* for the other judgment is unseemly for that sex. *Stamf. P. C. Lib. III. cap. 19. fol. 182. b.*

V. The judgment in all cases of felony is, *quod suspendatur per col- lam, quousque mortuus fuerit.*

But if a man be outlawd of treason or felony, tho there be no other judgment, but *utlegatus est per judicium coronatorum*, yet it is of itself an attainder and subjects the offender to an award thereupon to be made by the court, where he is brought, as is suitable to the offense, for which he is indicted and outlawd.

And this judgment is as well to be given against a nobleman as another in case of felony, and cannot be given otherwise by the court, or executed otherwise by the sheriff. *Co. P. C. p. 211 & 52. (k).*

VI. The judgment of *peine fort & dure* at this day in case of felony is only where the prisoner stands mute of malice upon his arraignment

(b) *Vide Part I. p. 352.*

(i) *Clement Peyrenin's case, vide Part I.*

p. 181. in notis. & p. 352.

(k) *Vide Part I. p. 521.*

ment or will not directly answer, for upon challenging above twenty his challenge shall be only over-ruled (l), and the trial proceed.

But at common law in all cases of felony and at this day in petit treason, if he challenge thirty-six peremptorily, he should have his judgment of penance (m), and this holds as well in an appeal as in an indictment, and as well in case of women as men. 2 Co. Inst. 177. *super fiat. Westm. 1. cap. 12.*

The entry of the judgment is thus :

Et quæsitum est per curiam ab eo qualiter se velit inde acquiescere, qui dicit, quòd ipse non vult se super aliquam juratam patriæ ponere, nisi solummodo in Deum; tunc insuper dictum est ei per curiam hîc, quòd nisi aliter in hâc parte respondeat mori debet, qui dicit, quòd non vult aliter respondere in hâc parte nisi ut prius, idèò considerat' est, quòd idem R. B. ducatur ad prisonam marescalciæ domini regis coram ipso rege, & ibidem nudus præter baccas suas ponatur ad terram super dorsum suum directè jacens, & foramen in terrâ sub ejus capite fiat & caput ejus in eodem ponatur, & super corpus suum ubi libet ponatur tantum de petris & ferro, quantum portare potest & plus, quamdiu vivit, & quòd habeat de pane & aquâ pessimis & prisonæ ei proximis, & illâ die quâ comedit non bibat, neque illâ die quâ bibit non comedat, sic vivendo quousque mortuus fuerit (n).

And if he stands wholly mute, then the entry is thus :

Et allocutus quommodo se velit de felonîâ prædictâ acquiescere, qui quidem R. nihil respondet, sed se mutum tenet, & super hoc captâ inquisitione per sacramentum 12 &c. si prædictus R. loqui possit, vel si prædictus R. prædicto die &c. loquutus fuerit necne, qui dicunt super sacramentum suum, quòd prædictus R. loquutus fuit isto eodem die & benè loqui potest si velit, idèò idem R. ut ipse qui legem recusat, hoc eat ad pœnam &c. ut supra. Catalla ipsius nulla.

And sometimes also the jury were charged to inquire *si malè credatur*, but that was but rarely in case of an indictment (o), for the indictment itself carries a probability, that he may be guilty when joined with his own wilful refusing his trial, so that he forfeits his goods by such standing mute.

VII. Judgment in petit larciny is only to be whipt, or imprisoned by way of chastisement (p).

(l) *Supra* p. 270, 314.

(m) *Supra* p. 268, 316.

(n) *Vide supra* cap. 43. p. 319. *Rast. Entr.* fol. 385. pl. 2.

(o) *Vide the case of Thomas de la Hethe su-*

pra p. 322. *in notis:*

(p) But by subsequent statutes the offender may be transported. See 4 Geo. 1. cap. 11. and 6 Geo. 1. cap. 23. *vide supra* p. 388. *in notis.*

VIII. Judgment in misprision of treason is forfeiture of all his goods, forfeiture of the profits of his land during his life, and imprisonment during his life (q).

IX. Judgment in thefbote is fine and imprisonment.

4 Blackf. Com. ch. 29. per tot. 2 Hawk. P. C. ch. 48.

(q) Part I. p. 374.

C H A P. LVI.

[401]

Concerning giving of judgment, by whom, and when.

WHAT courts have jurisdictions in causes criminal and capital have been handled before in the beginning of this Part; I am now to consider when one judge may give judgment upon a conviction before another judge, and how.

The king's bench is the center of all subordinate jurisdictions, especially in matters capital.

If *A.* be indicted of felony before justices of peace, *oyer* and *terminer*, or gaol-delivery, and be convicted by verdict or confession, if the record of the conviction be removed into the king's bench by *certiorari*, and the prisoner also be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there must be first a filing of the record in the king's bench, and a commitment of the prisoner to the custody of the marshal, and he must be called to say what he can, why judgment should not be given against him, and thereupon judgment may be given: *vide* 23 *H.* 8. *cap.* 1 & 11. 10 *H.* 4. 9. *a.* *Coron.* 467.

And indeed there was no other remedy before the statutes of 11 *H.* 6. *cap.* 6. & 1 *E.* 6. *cap.* 7. for judgment to be given upon persons reprieved before judgment, for the former commissions are determined by new ones at common law.

But if the conviction were not before the judge of the king's bench, so that the offender continued not always in custody of the marshal or of those that are his bail, but be removed by *habeas corpus* or brought in by process, the party so removed may plead he is not the same person and give some diversity of name, and if the king's attorney

confess it, he shall be discharged and process made out against the other person, thus it was done in the case of *John Apere*, *Lib. placitor' Coron. n. 7.* who was taken upon a *capias utlegat'* and pleaded he was not the same person.

Or the king's attorney may take issue upon it and aver him to be the same person, and known by one name or the other. *21 E. 4. Surry. Lib. placitor' Coron. placito 31. Nicholas Browne's case.*

Or if he answers nothing but stands mute, it shall be inquired whether he be the same person by inquest, before judgment be given against him, for he shall not be concluded by the return of the sheriff either upon a *capi corpus* or *habeas corpus*, if he was not always in custody of the same court from the time of his first arraignment, *vide accords 10 E. 4. 19. b.* but if he had been always in custody of the court of king's bench from the time of his arraignment, or had been bailed by the court, and came in and rendered himself upon his bail, then no such inquiry shall be made upon his standing mute. *10 E. 4. 19. b.*

And that I may say it once for all, the same law is where a party is outlawd or abjured, and comes by *capias utlegat'* or other process into the king's bench, he shall be demanded what he can say why execution should not be awarded against him upon the record removed, which *7 H. 6. 25. a. B. Coron. 44.* is called an arraignment; if he confess himself to be the same person, execution shall be awarded; if he deny himself to be the same person and the king's attorney confess it, he shall be discharged; if the king's attorney take issue upon it, it shall be tried; if the prisoner say nothing, it shall be inquired by an inquest of office whether he be the same person: *vide 8 H. 4. 3 & 18. B. Coron. 22, 23. 10 E. 4. 19. b. M. 5 Car. Croke, p. 176. Cox's case.*

If an issue be joined in the court of king's bench in an appeal of felony, or in an indictment of treason or felony either upon a record originally begun in that court, or removed thither by *certiorari*, the usual course now is to try it at the bar, or if it were removed by *certiorari* out of another county, to remit the record according to the statute of *6 H. 3. cap. 6.* to the justices, before whom such
 [403] indictment was originally taken, with a writ to command them to proceed therein, whether the record was so remitted before or after issue joined in the king's bench.

But

But many times that court antiently did, and at this day may send down the transcript to be tried by *nisi prius*, as well in an indictment as an appeal, and upon the return thereof the court may give judgment of death or acquittal, according to the verdict returned: *quod vide sæpius L.*

But whether they might inquire of abettors there hath been diversity of opinions, *vide 2 & 3 P. & M. Dy. 120, 121, 131. b.* but by the better opinion they cannot, *10 E. 4. 14. b. 4 Co. Inst. 160.* nor can they arraign the felon at the suit of the king, if the plaintiff be nonsuit in his appeal *22 E. 4. 19. a. (*)*.

It hath been held by some, that justices of assise and *nisi prius* may by virtue of the statute of *27 E. 1. de finibus cap. 3.* without any other commission deliver the gaol and give judgment of felons, *vide Stamf. P. C. Lib. II. cap. 45. fol. 57. b.* but yet that hath not been used, neither is it safe to be practised without a commission of gaol-delivery: *vide stat. 3 H. 5. stat. 2. cap. 7.*

But certainly at common law justices of *nisi prius* could not give judgment upon an appeal or indictment sent to them out of the king's bench by *nisi prius* to be tried, no more than in other ordinary civil causes, for they have but the transcript of the record before them, and their commission is only *ad triandum exitum*, and to remit the transcript with the verdict indorsed upon the *poslea* (+).

But by the statute of *14 H. 6. cap. 1.* justices of *nisi prius* have power in all cases of felony and treason to give judgment of acquittal or attainder at the day and place where their inquisitions, inquests, and juries are taken, and then and there to award execution to be made by force of the same judgments.

But yet it seems this statute gave them not power to inquire of abettors in an appeal, nor to arraign the prisoner upon a nonsuit before them at the king's suit, *10 E. 4. 14. b. 22 [464] E. 4. 19. a.* but this was to be done in the king's bench upon the return of the *poslea*.

But upon this statute these things are to be observed.

1. That they might return the *poslea* into the king's bench, and there, judgment may be given as at common law, for tho the statute gives them power to give judgment and award execution, yet it leaves them power to return the *poslea*, and takes not away the power of the

(*) *Vide supra p. 41.*

(+) *Vide supra p. 40.*

king's bench to give judgment and award execution upon the *poslea* returned, as they might have done at common law.

2. That as the prisoner cannot be arraigned nor plead to issue in the king's bench, unless the record and also the prisoner be there, so the record itself still remains in the king's bench, and only the transcript delivered to the judges of *nisi prius* and not the record itself, as upon the statute of 6 H. 8. yet upon that transcript the judges of *nisi prius* may give judgment and award execution by virtue of the statute of 14 H. 6. cap. 1.

But then the prisoner must either be sent down by *habeas corpus* to the sheriff of the county, where the *nisi prius* is, in custody, or else bailed to appear there, for no inquest can be taken by default, or in the absence of the prisoner in cases capital.

And if the prisoner be bailed by the king's bench to appear at the *nisi prius*, (as he may,) yet if he appear not, the inquest cannot be taken, but only the prisoner called upon his bail, and the default recorded, and so upon the return of the *poslea* new process against the prisoner, and also against his bail.

At common law by granting a new commission of the peace all proceedings before former commissioners of the peace were discontinued, and if an issue were joined, or a person convicted, or had judgment, the new commissioners could not proceed to trial, judgment, or execution, but all that could be done was to remove the record by *certiorari* and the prisoner by *habeas corpus* into the king's bench, and there to proceed where the justices left off.

[405] And to remedy this the statute of 11 H. 6. cap. 6. was made, whereby it is enacted, " That such proceedings shall
 " not be discontinued by such new commission, but the new justices
 " after they have the records before them shall have power to con-
 " tinue the same pleas and processes, and the same pleas and pro-
 " cesses and all that depend upon them to hear and finally determine,
 " as the other justices might have done, if no new commission had
 " issued.

By virtue of this statute new commissioners might not only give judgment upon conviction before former justices of peace, but might award execution upon judgments given by the former justices, as shall be farther shewn.

But this statute extended not to commissions of *oyer and terminer* and gaol-delivery, but only to commissions of the peace.

And

And therefore the statute of 1 E. 6. *cap.* 7. was made, which among other things enacts, “ That where any person shall be found guilty of
 “ treason or any felony, for which judgment of death should be given,
 “ and be reprieved before judgment, new commissioners of gaol-delivery may give judgment upon such conviction, as the justices of
 “ gaol-delivery, before whom he was convicted, might have done.

“ And that no manner of process or suit made, sued, or had before
 “ any justices of assize, gaol-delivery, *oyer* and *terminer*, of the peace,
 “ or other the king’s commissioners shall in any wise be discontinued
 “ by the making and publishing any new commission or association,
 “ or by altering the names of such justices or commissioners, but that
 “ the new justices of assize, gaol-delivery, and other commissioners
 “ may proceed in *every behalf*, as if the old commission and justices
 “ and commissioners had still remained and continued not altered.

Tho this statute in the first part thereof mentions giving of judgment upon a person convicted, yet I take it very clear they may award *execution* upon a party reprieved after judgment by former commissioners, for by the second clause they may proceed in *every behalf* as the former commissioners might have done, and therefore there is little cause for the *quære* made touching that point in *Dyer* (g), [406] yet I have generally observed this one rule, that I would never give judgment, or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him (h)

See the references at the end of the ch. next *supra*.

(g) *Dyer* fol. 165. a.

(b) The usefulness of this caution may be seen from what is observed by Sir *J. bn Hawles* in his remarks on *Cornish’s* trial, *State Tr. Vol.* IV. p. 203, where he relates the case of some persons, “ Who had been
 “ convicted of the murder of a person
 “ absent barely by inferences from foolish
 “ words and actions; but the judge before
 “ whom it was tried was so unsatisfied in
 “ the matter, because the body of the

“ person supposed to be murdered was
 “ not to be found, that he reprieved the
 “ persons condemned; yet in a circuit
 “ afterwards a certain unwary judge, without
 “ inquiring into the reasons of the
 “ reprieve, ordered execution and the
 “ persons to be hanged in chains, which
 “ was done accordingly; and afterwards
 “ to his reproach the person supposed to
 “ be murdered appeared alive.

C H A P. LVII.

Concerning executions.

MUCH of what concerns this matter hath fallen in under the former chapter, and therefore I shall be brief in it. I shall consider.

1. Who may award execution.
2. In what manner it is to be awarded.
3. By what warrant to be made.
4. By whom it is to be done.
5. In what manner.
6. Concerning reprieves or respite of judgment or execution.

I. As to the first of these it hath been dispatched in the former chapter, they that may give judgment may award execution.

And therefore the court of king's bench upon on *habeas corpus* and a *certiorari* to remove the body of a prisoner and the record of his outlawry or attainder before them may award execution upon [407] him. *M. 5 Car. B. R. Croke p. 176. Coxe's case, vide que dicta sunt supra cap. 56.*

II. Touching the manner of it there be certain cases, wherein tho the prisoner be attainted, yet he is not to have execution awarded against him, till he be demanded what he can say why execution should not be awarded against him, *viz.*

1 Where a woman is convicted and attaind by judgment, tho she remains always in custody, so that *constat de personâ*, yet execution is not to be awarded against her till she be demanded what she can say why execution should not be awarded, for she may allege pregnancy, which, tho it be no cause to respite judgment, is a good cause to respite execution.

2 Where the judgment was given at a former session, for in that interval between this and the former session he may have a pardon to plead.

3 Where the prisoner hath not always remained in the custody of the court, where he first had judgment, for in that case, if he be brought in by a *capias* by the sheriff, he shall not be concluded, but
that

that he may say he is another person, and issue may be taken upon it, and that issue shall be tried before he shall have execution awarded against him, and if he stands mute, it shall be inquired whether it be of malice. 10 E. 4. 19. b. Again,

4. If judgment were given in another court, or by other justices, as in case where a record of an attainder comes from another court by *certiorari* into the king's bench, or if a man be outlawed for felony, and the outlawry either removed or returned into the king's bench, and the felon brought in by *habeas corpus* or *capias utlegat'* he shall be demanded what he can say why execution should not be awarded against him, which 7 H. 6. 25. a. is called an arraignment, for in these cases, 1. He shall not be concluded by the return of the sheriff from saying he is not the same person that was outlawed, and upon that, issue may be joined, and it shall be entered of record and tried (*), unless the king's attorney confesseth it: *vide supra cap. 56.* 2. He may have the king's pardon to plead. 3. In case of an outlawry he may assign error in the outlawry, and pray res- [408] pite to purchase a writ of error, and the court usually in such a case prefixeth him a day, and gives him respite to purchase a writ of error, and in the mean time remits him to the marshal and respites his execution.

Thus it was done in the case of *David Dene*, H. 16. E. 4. *Placit. cor. n.* 57. who was taken by a *capias utlegat'* returnable in the king's bench, *Et statim quæsitum est ab eo, si quid pro se habeat vel dicere sciat, quare ad executionem de eo super utlegariâ prædictâ procedi non debet.*

He alleged, that at the time of the outlawry pronounced he was in prison in the tower of London, *Et statim quæsitum est ab eo per cur' si habeat aliquid breve de errore necnè, qui dicit quòd non; idèd injunctum est eidem David ex gratiâ per curiam, quòd ipse breve de errore in hac parte habeat coràm domino rege in octabis Hillarii*, and upon his failure a second and a third peremptory day was assigned him, at which day he shewed to the court a writ of error and assigned the same error in fact, and issue was taken upon it, and a *venire facias* returnable in Mich. term, the prisoner still remaining in custody, and execution respited till the issue tried.

But it is to be noted, that he that will delay his execution by alleging error in the outlawry and praying liberty to purchase a writ of error, must allege error in fact, or error in law upon the outlawry to obtain

(*) *Kel. 13.* The case *Barkst. d. Okey* and *Cerber.*

that respite of execution before his writ of error be brought, for if the court be satisfied, that it is merely a pretense, they may chuse, whether they will allow him a day to sue forth a writ of error, but may award execution presently. 1 *H. 7. 13. b. John Collin's case, vide Co. P. C. p. 212.*

If either the prisoner himself, or any as *amicus curiæ*, inform the court of any error in the outlawry, the court *ex officio* must prefix him a day to purchase his writ of error, and in the mean time respite execution, but if he purchase not his in convenient time, execution shall be awarded.

III. By what warrant the execution is to be made.

[409] In the king's bench there is no other writ nor warrant but an award of the court upon the judgment, *viz. Et dictum est marescallo, quòd faciat executionem periculo incumbente*, for in the king's bench the marshal is the immediate officer of the court to make execution in these cases, for that court never gives judgment against any, that is not *in custodia marescalli* in cases capital, and so are all the ancient and modern precedents, *vide 3 H. 7. 7. a. M. 5 Car. B. R. Cro. p. 176. Coxe's case*, and so was directed by the court upon view of the precedents themselves mentiond in my lord Coke's book of *Entries, Tit. Indictment per totum, P. 25 Car. B. R. in Brown's case (a).*

When an attainder of felony or treason is against a nobleman, the judgment is pronounced by the lord high steward, and the warrant for execution is under his precept and seal in his own name. *Co. P. C. p. 31.*

When judgment is given by commissioners of *oyer and terminer*, regularly the precept for execution should issue to the sheriff in the names and under the hands and seals of three of the commissioners, whereof one to be of the *quorum*, before whom judgment was given, *Co. P. C. p. 31.* but by usage (as far as I can learn of late times,) it is now done only by leaving a calendar with the sheriff declaring their judgments (*).

When a man hath judgment of death before justices of gaol-delivery, the regular way is, either to issue a precept to the sheriff, in the names of the commissioners, reciting the judgment, and commanding execution to be done, or otherwise by an award upon the record, *Et dictum est per curiam hìc vicecomiti comitatùs prædicti, quòd faciat executionem periculo incumbente.*

(a) 3 *Keb. 193. 1 Vent. 243.*

(*) *Supra p. 31.*

But of latter time there is no more done, but after judgment entered the judge subscribes a calendar in paper, directing the several judgments of deliverance of the parties acquitted, or the execution of the parties condemned.

Only *Rolle* would never subscribe any such calendar (*), but would command the sheriff openly in court to take notice [410] of the judgments and orders of what kind soever, and command the sheriff to execute them at his peril.

The reason of the difference between justices of gaol-delivery and of *oyer* and *terminer* is this; all the precepts, that issue at a sessions of *oyer* and *terminer*, as for a *venire facias tales*, &c. ought in true order of law to be by precept in the names and under the seals of the justices, but the precepts by justices of gaol-delivery need not be otherwise than by a simple award upon the roll: *Ideo præceptum est vicecomiti, quod venire faciat hinc &c.*

IV. By what officer execution is to be made

Regularly the officer, that is to make the execution, is that officer in whose custody by law the prisoner is at the time of the judgment given, for into his custody he is to be remanded after judgment pronounced, and there to stay till judgment executed.

Therefore, where judgment is given at the sessions of gaol-delivery, the execution is to be made by the sheriff, or his under-sheriff or deputy, for regularly he is in his custody ordinarily, but if the prisoner be in the *Tower of London*, (which is oftentimes the case of persons indicted for great treasons,) and he be arraigned before justices of *oyer* and *terminer*, he is commonly brought before them by a precept to the constable of the *Tower*, (which is an exempt prison from that of the sheriff,) and if he be convicted and attaind, he is commonly remitted thither, and the precept or warrant for execution must go to the lieutenant or constable of the *Tower*, for it is pursuant to the judgment, viz. *quod prædictus E. ducatur per præfatum locumtenent' turris London usque ad dictum turrim, & deinde per medium civitatis Lond. directè trahatur usque furcas de Diburn &c.* And thus it was done in the cases of the traitors at the powder-treason 3 Jac. But usually a command or precept is made to the sheriffs of *London* and *Middlesex* to be assisting to the lieutenant.

If the prisoner be arraigned in the king's bench either for treason or felony, he is or ought to be always first committed [411]

(*) *Vide Part I. p. 501.*

to the marshal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution, and wheresoever the felony or treason was committed, yet the marshal is to make execution, for he is in this case the immediate officer to the court, and the prisoner is not in the custody of any sheriff, but of the marshal.

And therefore the entry in this case of felony is, *Et dictum est marescallo, Quòd faciat executionem periculo incumbente.*

But in case of high treason the marshal is mentioned in the very judgment, *viz. quòd ducatur per præfatum marescallum usque prisonam marescalli marescalliæ domini regis, & deinde usque ad furcas sancti Thomas Wattrings trahatur & ibidem suspendatur &c.* thus is the entry of the judgment, *P. 44 Eliz.* against *Patrick Dalph B. R. T. 43 Eliz. B. R.* against *John Tipping, T. 39 Eliz. B. R.* against *John Jones.*

And in the case of *Brown P. 25 Car. 2.* that had judgment in the king's bench for felony upon the statute of 3 *H. 7.* for an offense committed in *Middlesex*, and there presented and convicted, the execution was made by the marshal in the usual place of execution in the county of *Surrey (b).*

Only in these and the like cases the court gives order to the sheriff of the county, where the execution is made, to be assisting to the marshal.

V. As to the manner of the execution, as it is to be done by the proper officer; so it is to be done pursuant to the judgment.

The judgment in case of felony is, *suspendatur per collum, quousque fuerit mortuus.*

The sheriff may not alter the execution, if he doth, it is felony, and some say murder. *Co. P. C. p. 211, 217. (c).*

[412] If the party be hanged and cut down and revive again, yet he must be hanged again, for the judgment is to be hanged by the neck *till he be dead (d).*

The judgment in high treason is complicated, *viz. hanging, beheading imbowelling, &c.*

The king may pardon all but the beheading, for this is part of the judgment, the judgment is not altered, but part of it remitted. *Co. P. C. p. 52.*

But this must be under the great seal. *Co. P. C. p. 31.*

2 Hawk. P. C. ch. 51. 4. Black. Com. ch. 32.

(b) The like was done in *Altboe's case* T. 9 Geo. 1. B. R. *vide supra* in note Part I. p. 464.

(c) *Vide Part I. cap. 42. p. 501. in note.*

(d) *V. de Coron. 335.*

C H A P. LVIII.

Concerning reprieves before or after judgment.

REPRIEVES, or stays of judgment or execution are of three kinds, *viz.*

I. *Ex mandato regis*, thus we find it done in 3 *H. 7. 7. a.* tho *ore tenus*, or by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.

II. *Ex arbitrio judicis*. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. *Crompt. Just. 22. b.* and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. *Dy. 205. a.*

III. *Ex necessitate legis*, which is in case of pregnancy (*e*), [413] where a woman is convict of felony or treason. *Co. P. C. 17. Stamf. P. C. Lib. III. cap. ult.*

1. *Enseinture* is no ground to stay judgment, and therefore if a woman convict be asked what she can say why judgment should not be given, *enseinture* is no cause of stay; but when judgment is given, she ought again to be demanded why execution should not be made, and there she may allege *enseinture in retardationem executionis*. 22 *Affiz. 17. Coron. 180.*

2. *Enseinture* is no cause to stay execution, unless she be *enseint* with a *quick* child, or which is all of one intendment, if she be *quick* with child. 22 *Affiz. 71. Coron. 180.*

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve discreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or stay. *Ibid.*

4. This privilege is to be allowd but once, for if she be a second time with child, she shall not thereby delay execution, but the gaoler

(e) Thus it was by the civil law. *Dig. l. 35. vide Bract. de Coron. cap. 32. §. 11. Lib. XLVIII. tit. 10. de pœnis l. 3. and also by the laws of William the conqueror l. 35. vide Bract. de Coron. cap. 32. §. 11. Fleta Lib. I. cap. 38. §. 15. vide Part I. p. 363.*

shall be punished for not looking better to her. 12 *Affiz.* 11. *Coron.* 168. 23 *Affiz.* 2. *Coron.* 188.

If she be *priviment enseint* and not *quick with child*, and only so found by the jury of women, that is no cause of respite; but I have rarely found but the compassion of their sex is gentle to them in their verdict, if there be any colour to support a sparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho she be delivered before the next sessions, yet the sheriff ought not to make execution after her delivery, neither ought the judge to give such direction upon the reprieve granted, but at the next session the woman must again be call-

[414] ed to shew what she can say why execution should not now be made, and she is to be heard 12 *Affiz.* 11. *Coron.* 168. *amefne al barre*, for it may be the *tempus præstitutum* for her delivery since the last sessions is not yet past, and she must stay till then, or it may be she hath since had the king's pardon, which the sheriff cannot allow nor judge of.

And therefore the books tell us, that after her delivery she was brought to the bar again to shew what she could say why execution should not be made; this bringing to the bar must needs be at a second or following sessions. 12 *Affiz.* 11. *Coron.* 168. 22 *E.* 3. *Coron.* 253.

The End of the Second Volume.

A

T A B L E

O F

THE PRINCIPAL MATTERS

CONTAINED IN THE

TWO PARTS OF THIS TREATISE.

N. B. In the following Table, where there are no numerical letters, the pages referred to are in the first Part, and so are the pages which precede these letters, ii; but the pages, the numbers of which come after these letters in the Table, are in the second Part.

In the first *Part* (through mistake) after page 146 follows a repetition of the pages 143*, 144*, 145*, 146*, which are distinguished by asterisks both in the book at large, and in the Table; so in the second *Part* after page 156 ensues an iteration of page 149*, and of the successive numbers to 157 exclusive, which iteration or repetition is also pointed out by asterisks, as well in the Table, as in the book.

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- But if manslaughter committed, and a party suspect is brought before two justices of peace (whereof one of *quorum*), and there be any doubt of identity of the person, they may bail him by 1 R. 3. ib.
- 1 R. 3. the *basis* of 3 H. 7. and this of 1 & 2 P. & M. ib.
- 3 E. 1. (*Westm. 1.*) tho it say *de morte hominis*, there is no bail at common law, it must be intended, when offender is certainly known; for it generally provides, that persons taken on a light suspicion shall be bailed. ib.
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If prisoner challenge six of the jurors for cause, and causes be found insufficient, and the six are sworn, whereby inquest remains *pro defectu juratorum*, a *tales* granted, and jury appear, the prisoner may challenge peremptorily any of the six; but if it happen, that a new cause of challenge intervene after former swearing, and he challenge for cause, he must shew the cause happened after former swearing ii. 270, 274

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No principal challenge either to array or poll, that theriff or juror is of *king's* livery, but he must conclude to the favour. ib.

If alien be indicted or appealed of felony, tho indictors ought to be *English*, yet by 28 E. 3. trial shall be *per medietatem lingue*, save in *felony by Egyptians* ib.

This statute extends as well to felonies made after as before ib.

Extends not to trial of aliens for treason ib.

If alien indicted of felony plead *not guilty*, and a common jury be returned, if he surmise not *his being an alien* before any of

jury sworn, he hath lost that advantage; but if he surmise it, he may challenge the array for that cause, and thereon a new *venue fac.* shall issue, or award be made of a jury *de medietate lingue*; but more proper to surmise it on plea pleaded. ii.

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In treason or felony, whereto prisoner pleads *not guilty*, at common law four hundreders ought to be returned ib.

35 H. 8. requiring six hundreders, and 27 Eliz. requiring only two in personal actions, extend not to trials on indictments of treason or felony ib.

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By 33 H. 8. for treason or felony committed in *king's* household, all challenges, save for malice, ousted ib.

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- ribus*, tho one dies, whilst plural number remains, a return by the coroner is good; but if only one survive, he cannot execute and return it till another made
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- But if two coroners in a county, or more, one may execute the writ, as in case of an *exigent*; but the return must be in the name of *coronatores* ib.
- Coroners amoveable for cause, and new ones may be chosen by writ, tho cause not traversable; yet if false, they may have a *superfedeas* to the new writ ib.
- Their power of proceeding to trial or judgment in pleas of the crown, or execution upon outlawry, taken away by *Magna Charta* ii. 56, 68
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- If one die of hunger, and vill bury him before coroner sent for, it shall be amerced; *contra*, if of a fever or apoplexy ib.
- If vill leaves a body, that died of a violent death, above ground unburied, it shall be amerced: such amercements may be set on presentment of grand inquest, or coroner ib.
- If prisoner die in *king's* bench prison, clerk of the crown, who is coroner of that court, is to view the body ii. 58
- Coroner must take inquisition in person, or else it is void ib.
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- If body buried before he come, what he ought to do in such case, cannot take inquisition, otherwise than *super visum corporis* ii. 58, 66
- If he take inquisition without view of the body, he may take second inquisition upon view of it; second good, first void ii. 58, 59
- But if first be taken on view, second is void ii. Page 59
- In default of coroner, who may inquire of a *felo de se*, or other sudden death; justices of peace, or *oyer* and *terminer* may inquire thereof, and so may *B. R.* but then that presentment is traversable ib.
- If constables make not a return of coroner's precept, or jurors appear not, constables or jurors in default, by whom amerced ib.
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- 11 *H. 4.* extends to these inquisitions; and if a juror be outlawed, tho but of trespass, this a good plea to coroner's inquest of murder ii. 60
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- If one be killed by another, and it be certainly known that he killed him, it hath been held, that jury must hear evidence only for the *king*, and jury must find it murder, tho justifiable or excusable *homicide*; but this practice neither warranted by law nor reason ib.
- His inquest rather for his information of the truth of the fact, than for an accusation ii. 61
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- Antient practice hath been for coroner's inquest to find the matter, as they judge it ib.
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- Whole evidence to be returned with inquisition ib.
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- In no case coroner sets any fine or
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impose it ib.
- If inquest find one *felo de se*, what
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- First finder of body to be bound
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- If party slain and felon not known,
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Where one is assaulted so fiercely, that he cannot fly, law will interpret this necessity to a flight to give him the advantage of *se defendendo*: but *contra*, where first assailant is re-assaulted so vigorously that he cannot fly, law will not let him take advantage of this necessity, the consequence of his own wrong ib

Where

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Where *A.* the first assailant flies, and the affray is interrupted, and *B.* the first assaulted pursues *A.* to kill him, and *A.* after his flight, on necessity of saving his life, kills *B.* it is but *se defendendo*; but when done altogether, without any interval of flight or parting, and *B.* gains the present advantage by his address or courage to preclude flight of *A.* and then *A.* kills him, manslaughter Page 483

Flight to gain advantage of *se defendendo* to party killing must not be feigned, or to gain advantage of breath, &c. it must be from the danger, as far as party can, either by reason of some wall or other *non ultra*, or as fierceness of assailant will permit ib

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Like law, where husband kills in defence of wife, parent of child, and *é converso* ib

How far relation of acquaintance, and mutual society will excuse one companion killing in necessary life-guard of life of another ib

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What the offense in killing him, that takes the goods, or doth an injury to the house or possession of another, herein many differences, as between a trespassable and felonious act, and felonious acts themselves 485 to 489

If *A.* pretending title to the goods of *B.* take them away from *B.* as a trespasser, *B.* may justify beating *A.* but if he beat him, so that he dies, it is manslaughter 485, 486

A. is in possession of *B.*'s house, *B.* endeavours to enter on him, *A.* can neither justify assault, nor beating of *B.* because *B.* had right of entry; but if *A.* be in possession of a house, and *B.* as trespasser enters on him, *A.* may *molliter manus imponere* to put him out, and if *B.* resist, and assault *A.* then *A.* may justify beating him *de son assault demesne* 485

But if *A.* kill him in defence of his house, it is manslaughter 485, 486, 487

A. being in possession of a house by title, *B.* endeavoured to enter, and shot an arrow at them within, and *A.* from within shot an arrow at those that would have entered, and killed one of them; not *se defendendo*, but manslaughter, because no danger of *A.*'s life from them without 485, 486

If *B.* had entered into the house, and *A.* had gently laid his hands on him to turn him out, and then *B.* had turned on him and assaulted him, and *A.* had killed him, so if *B.* had entered on him and assaulted him first, and *A.* had killed him, it had been only *se defendendo*, tho entry of *B.* was not to murder, but as a trespasser to gain possession 486
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- If one come to rob me, and take my goods as a felon, and I kill him, it is *me defendendo* at least, and in some cases justifiable ib
- At common law, if a thief had assaulted a man to rob him, and he had killed him in the assault, it had been *se defendendo*; but *quære*, whether he had forfeited his goods 487
- One attempting a burglary with intent to steal, or kill, or attempting to burn the house of another, if owner of the house, or any within had shot and killed the person so attempting, this had been no felony or forfeiture ib
- By 24 H. 8. killing any one attempting any robbery or murder in or near the highway, &c. or in a mansion-house, or attempting to break a mansion-house in the night by any person, &c. he who kills (tho a lodger or servant) shall be absolutely acquitted and discharged of the death of such person ib
- There being malice between A. and B. and having fought often, and afterwards meeting suddenly in the street, A. said he would fight him, B. declined it, and fled to the wall, and called others to witness it, and A. pursued and struck him first, and B. in his own defense killed him, he was acquit from any forfeiture by this *act* 487, 488
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If an offense be at common law, and also prohibited by statute with a corporal, or other penalty, party may be indicted at common law; and if it conclude not *contra formam stat.* it stands only as indictment at common law, and he can receive only the penalty the common law inflicts

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Wherein the *civil* and *common law*

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As to crimes, into what periods *civil law* distinguisheth the ages, and at what age it presumeth men *capaces doli*, or not 18, 19, 20 Both *civil* and *common law* leave the question, whether party *capax doli*, or not, *ad arbitrium judicis* on the circumstances, and with what caution 18

By common law, as to offenses not capital, in some cases infant is privileged by his non-age; and herein privilege is all one, whether above fourteen or under, if he be under twenty-one years; but with some and what differences 20

Infant convict of riot, &c. shall be fined and imprisoned, and not be privileged barely because under twenty-one; but court *ex officio* on his trial ought to examine, whether he is *doli capax*, and had discretion to do the *act* wherewith he is charged ib

But if offense charged be a mere non-feasance, (unless of such a thing as he is bound by tenure, or the like to do, as to repair a bridge, &c.) there in some cases he shall be privileged by his non-age, if under twenty-one, tho above fourteen; because *taches* in such case shall not be imputed to him ib

If infant in *assise* vouch a record, and fail at the day, he shall not be imprisoned; and yet *Westm.* 2. that gives imprisonment in such case, is general ib

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- Fourteen years common standard, at which both males and females are subject to capital punishments for offenses committed by them at any time after that age 25, 26, 28
- Infant under fourteen, and above twelve, is not *prima facie* presumed *doli capax*, and therefore regularly for a capital offense committed under fourteen is not to be convicted, but may be found *not guilty*, or jury may find specially, and how; in which case court ought to discharge him, because no felony 26 to 29
- Yet if it appear to the court that he was *doli capax*, when offense committed, he may be convicted and suffer death, tho he hath not attained *annum pubertatis*, viz. fourteen 26, 434, 569, 570
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ib
- If thirteen be sworn by mistake, swearing of last is void, and the other twelve shall serve
ib
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ib
- Court at common law may on just cause remove a juror after sworn
ib
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- After their departure they may hear one of the witnesses again in open court, and may desire to propound a *question* to the court for their satisfaction; and it shall be granted, so it be in open court; but if otherwise, this appearing by examination in court, and indorsed on *posse* will avoid the verdict
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- If they agree not before departure of justices of *gaol-delivery*, they must be conveyed along in carts, and judge may take and record their verdict in a foreign county; *quere*, whether in such cases, the session may be adjourned before verdict taken
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- If there be eleven agreed, and but one dissenting, who says he will rather die in prison than consent, yet verdict shall not be taken by eleven, nor refuser fined or imprisoned
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- But if he, or any in his behalf say to a juryman after his departure from the bar, and before verdict given, *the case is clear for plaintiff*, this shall avoid verdict, if given for him, for it is new evidence ib
- If *A.* be challenged off, and twelve more sworn, yet *A.* goes with them, and is present at their consultation, if *A.* gives no new evidence, nor intermeddles, verdict good, but *A.* shall be fined
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- If a jury say *they are agreed*, and it being asked, who shall say for them, they say *their foreman*, but on further inquiry they are not agreed, every one of them shall be fined apart ib
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- If eleven were agreed, and the twelfth refused, formerly such juryman hath been fined, and inquest taken by the other eleven ib
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- Justice of Assize and *Nisi prius*.
- Justices of assize are to send their records determined into the Exchequer at *Michaelmas* ii. 31
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Justice of Peace.

They have no jurisdiction in treason, except as a felony [which treason includes], and as a breach of the peace; they may take examination of traitors, and imprison them, and take information of witnesses, and bind them over, and transmit these examinations and informations to next gaol-delivery, &c. 350, 372, 580. ii. 44

They cannot regularly arraign, try, and give judgment in treason, unless in such cases, as are by special *act* committed to their cognizance, because their commission extends not to it 350, 372. ii. 44

Per Rolle, C. J. they may take indictment of treason, tho they cannot try it 372

By some *act* may take indictments of particular treasons, but must certify them into B. R. or gaol-delivery ii. 44

May issue their warrants within precincts of their commission for taking persons charged of crimes within cognizance of sessions, and bind them over to appear there, tho not indicted, notwithstanding lord *Coke's* opinion to the contrary 579

Where justice of foreign county may grant his warrant, and commit offender; and where offender taken in a foreign county must be carried before a justice of proper or foreign county, or which of them. *Vide Arrest.*

If A. be in commission of peace in

proper county, and happen to be in a foreign county, and complaint is made to him of a felony done in proper county, as he cannot issue a warrant to take party, so neither can he imprison in foreign county, because an *act* of jurisdiction; but he may take oath of party robbed in pursuance of 27 *Eliz.* or may take examination or information, or recognizance in foreign county (*sed quare* of the last), but cannot compel them by imprisonment Page 581. ii. 50, 51

One is a justice in two adjacent counties, tho by several commissions, whilst he lives in one county, may send his warrant to arrest in the other 580

Convenient, tho not always necessary, to take information on oath; if party suspected, then to set down cause of suspicion 582

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Examinations ought to be in writing without oath, and returned or certified to next gaol-delivery, &c. and being sworn by justice or clerk to be truly taken, may be given in evidence 585. ii. 52

If justice at return of warrant cannot take examination; he may *ore tenus* order officer to detain prisoner till next day, and this detainer justifiable without shewing particular cause, or any warrant *in scriptis* ib

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- Commission of *oyer* and *terminer* in the county determines second *assignavimus* of commission of peace *ad audiendum & terminandum, quod quere*
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- General commission of peace in county determines not power of former justice by charter, nor of justice in a city or corporation parcel of county
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- Where no words of exclusion, justice of peace of county have a concurrent jurisdiction with those by charter, and so if they be justices by commission in town or city
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- But

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- But if franchise be granted *ita quod justiciarii comitatûs se non intromittant*, tho subsequent commission be granted in county at large, they have no jurisdiction in this corporation or town; but *quære*, whether indictment or session in the franchise be void, or only contempt in justices ii. Page 47, 48
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Whether the two penalties previous to treason in case of words, viz. for the first and second offence in 5 & 6 *E. 6.* be repealed by any *act* ib

Words no provocations to kill a man, nor will they lessen a crime from murder to manslaughter, except words of menace of bodily harm 456, 457

Vide *Murder, Treason*.

Heat and Day. Vide *Compensation*.

F I N I S.

CORRIGENDA in the TABLE.

In titulo Allegiance for *fidelitas regia*, read *fidelitas legea*. From *Ambassador* refer to *Treason*. From *Amendment to Record*. In the references under *Appeal*, instead of *Vide Process*, make it *Vide Outlawry*. *In titulo Arrest*, after these words, *For what end constable or any other during affray may break open doors*, insert *but not after—unless, &c.* Under *Burglary* dele *clergy allowed to one attain*, which is inserted under its proper head *Clergy*. For the form and *analysis* of caption of indictment on return of *certiorari*, refer from *Certiorari* to *Indictment*. From *Certiorari* refer to *Writ*. Refer from *Coverture* to *Principal and Accessary*. Under *Jesuit* dele reference to *Treason*.



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